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SUSAN S. HANSEN,

v.

DUNCAN N. HANSEN.

GEORGE E. SHAMBAUGH, JR.,

Petitioner - Appellee,

v.

DUNCAN N. HANSEN and RICHARD B.
HANSEN,

Respondents - Appellants.

102-921
A
APPEAL FROM

SUPERIOR COURT OF

COOK COUNTY.

MR. PRESIDING JUSTICE DEMPSEY DELIVERED THE OPINION OF THE COURT.

This appeal is from an order granting the petition of the appellee for the temporary custody, during the month of August 1959, of the three minor children of the parties. Various issues were originally raised on appeal, but by stipulation of the petitioner and the respondents it was agreed that this court should hear the cause upon the merits only and that all other issues would be eliminated.

Susan S. Hansen and Duncan N. Hansen were divorced in April 1959. The divorce was obtained by Susan Hansen on the grounds of cruelty, and the custody of the children, Nancy, now 6 years of age, Charles, 4, and Laura, 2, was given to the mother.

On May 24, 1959, Susan Hansen was found murdered in her home. Duncan Hansen has been indicted for this crime and is now in the County Jail of Cook County awaiting trial.

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Richard B. Hansen, a brother of Duncan, took the children to his home. They have continued to reside there with the approval of the trial court, who permitted them to remain with him pending the court's final determination as to their permanent custody.

The petitioner is the maternal grandfather of the children. They have visited him a few times since living with their uncle, Richard, and, in the past years, have spent some part of the summer with him at the summer home in Michigan. The petition stated that he would be having his vacation during the month of August and that he desired to have the children with him; that the children would be under the supervision of the petitioner, who is a physician and surgeon. The answer of the respondents opposed the petition and averred that the grandfather believed Duncan guilty of the murder of Susan and that the resultant hostility toward the respondent would be detrimental to the welfare of the children; that Nancy was expected to be a material witness at the criminal trial for her father and that he might be deprived of this testimony if she were out of the state at the time of his trial. In addition thereto, before the trial court and before this court, it was argued that the grandfather might attempt to influence the child against her father and cause her to alter her expected testimony.

Dr. Shambaugh testified in support of his petition. He assured the court that while the children were visiting him they would not hear anything about the trial of Duncan or the tragedy that took place. A psychologist, who had visited Dr. Shambaugh at his summer home, testified that he was familiar

with the surroundings, that the home had excellent facilities for play and that it was a desirable place for the children to spend a vacation. No evidence was presented to the court by the respondents. Raymond I. Suekoff, who had been appointed guardian ad litem for the children, testified that he had visited them three times at the Hansen home and found it to be an ideal place for them. In a statement to the court he said that he saw no reason why the children should be deprived of an opportunity to associate with their grandfather during a vacation.

At the time of the hearing the date for the trial of Duncan Hansen had not been definitely decided. Since then it has been set for September 21, 1959. Under the court's order the children are to be returned on August 29, 1959. Accordingly, they will be in this jurisdiction at the time of the trial and will have been living with Richard Hansen several weeks prior to the trial. If the children are not returned on the date ordered, the criminal trial certainly would be postponed until such time as Nancy became available. She has made at least three statements which show what her testimony will be. One was at the Coroner's inquest, a second was made to the State's Attorney in the presence of the guardian ad litem, and a third has been made, since the hearing in the trial court, to an attorney representing the defendant. It appears that all these statements were of the same purport. There is nothing in the record before us to support the contention of the respondents that the grandfather would attempt to influence the child against her father or would endeavor to have her change these statements or her testimony.

The grandfather, in response to the trial court's questions, assured the court that she would hear nothing about the trial or the tragedy, and that she would be treated exactly as she had been during her weekends with him.

The only question before this court is whether or not the chancellor properly exercised his discretion in permitting the children to visit the petitioner. The Illinois divorce statute confers upon the trial court a wide discretion in determining to whom the temporary or permanent custody of children shall be awarded. Ill. Rev. Stat. 1957, ch. 40, §19. However, the exercise of this discretion is subject to review. The primary factor which should always influence the court's decision is the best interest and welfare of the children. *Nye v. Nye*, 411 Ill. 408; *Cohn v. Scott*, 231 Ill. 556; *Fountaine v. Fountaine*, 9 Ill. App. 2d 482.

In the case before us the trial judge carefully considered the problem before him, having in mind the best interests of the children, and he concluded that their welfare would be best served by allowing them to travel to Michigan with their maternal grandfather for the month of August. We believe the chancellor was acting within his discretionary powers in permitting this, and for this reason we affirm his decision. The mandate of this court is to issue forthwith.

AFFIRMED.

MCCORMICK AND SCHWARTZ, JJ. CONCUR.

47725

PEOPLE OF THE STATE OF
ILLINOIS,

Defendant in Error,

v.

VITO CERINO,

Plaintiff in Error.

)
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) ERROR TO MUNICIPAL
) COURT OF CHICAGO.
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MR. PRESIDING JUSTICE DEMPSEY DELIVERED
THE OPINION OF THE COURT.

The defendant, Vito Cerino, was charged with contributing to the delinquency of Judith McKinney, a minor age 16, by having sexual relations with her in June 1957. The information, which was filed in May 1958, was signed by her mother, Ruth Skebelsky. Cerino was found guilty in a nonjury trial and was fined \$200.00. He contends that the evidence was insufficient to sustain the conviction.

The prosecutrix testified that she first met the defendant, a bondsman, when he posted bond for her, following her arrest in June 1957, on a loitering and disorderly conduct charge. She said he told her that he was supplying the bond at the request of the man with whom she was living, that he had been paid only \$50.00 of his \$150.00 fee, and "if you have intercourse with me we can forget about the rest of the bond." She said she had sexual relations with him once in a hotel room and twice in his office. She further testified that she made friendly visits to his office at various other times.

The defendant acknowledged that the girl, whom he knew as Corinna Jones, visited his office but he denied the acts of intercourse. Four witnesses testified to the defendant's good reputation for moral character. He testified that he was 45 years of age, had been married for 18 years and had a daughter 9 years old and a son 16 years old. He also stated that subsequent to the filing of the information Mrs. Skebelsky came to his office and said she would not press charges against him or anyone else if he would help her get back clothes and jewelry, valued at \$6,000.00, which her daughter had stolen from her about two months earlier. This charge was not denied by Mrs. Skebelsky, who, in her testimony, admitted having talked with him in his office. The girl stated she knew her mother offered to drop the charges if she got her property or \$6,000.00 from the defendant.

The courts of Illinois have repeatedly held that while accusations of sex violations are easily made, the charges are hard to prove and are much more difficult to defend, however innocent an accused may be. To sustain a conviction on such charges the testimony of the prosecutrix must be clear and convincing or must be corroborated. People v. Goard, 11 Ill. 2d 495; People v. Williams, 414 Ill. 414. Here there was no corroboration; therefore, we must determine if the testimony of Judith McKinney was of the required

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character and if the evidence in its entirety justifies the finding of guilty.

The record shows that she ran away from home at 14 and gave birth to an illegitimate child shortly thereafter. She had been arrested several times and had been in various institutions; she had been in the Illinois State Training School for Girls, had been a runaway from that school and had been arrested for violation of parole; she lied about her age and her name; she lived with different men and was used as a prostitute; she stole personal property worth thousands of dollars from her mother and was under the custody of the juvenile authorities at the time of the trial.

Clearly, the young lady was devoid of almost all moral inhibitions. This does not necessarily make her testimony untrue but it does cast suspicion upon it and compels us to view her accusations with skepticism. And when, together with this questionable testimony, we consider that 11 months passed before the charge was brought, that her mother signed the information and thereafter offered to drop the case if the defendant would have her clothing and jewelry returned, we cannot say that the State's evidence meets the requirements of the law. We do not believe the defendant was proven guilty beyond a reasonable doubt and the judgment must be reversed.

Judgment reversed.

Schwartz and McCormick, JJ., concur.

Abstract only.

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT -- SECOND DIVISION
OCTOBER TERM, A. D. 1959

HENRY WEBB,

Plaintiff-Appellee,

-vs-

GENE MARCHESI, d/b/a Freeport
Lincoln-Mercury Co.,

Defendant-Appellant.

Appeal from the
Circuit Court of
Winnebago County.

CROW, J.

The plaintiff-appellee, Henry Webb, brought suit against the defendant-appellant, Gene Marchesi, d/b/a Freeport Lincoln-Mercury Co., and the defendant Commercial Credit Corporation, for damages in connection with a contract relating to, or for wrongful repossession and conversion of, an automobile. The Trial Court, hearing the case without a jury, found for the plaintiff, and against the defendant, Gene Marchesi, d/b/a Freeport Lincoln-Mercury Co., assessed damages in the sum of \$1013.00, and entered judgment thereon. That defendant appeals. The Trial Court found in favor of and entered a judgment for the defendant Commercial Credit Corporation against the plaintiff that the plaintiff take nothing as against that defendant. There is no cross appeal from that judgment.

The third amended complaint charged that on or about February 1, 1956, the defendants, or one of them, undertook to sell, transfer, or assign, to the plaintiff all right, title, and in-

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terest in a 1955 Mercury automobile for \$2650.00; the plaintiff was to pay a \$270.00 cash down payment and monthly installments of \$70.00 each; the plaintiff was taken to Commercial Credit Corporation by Rufus Mathews, the agent of the defendant Gene Marchesi, where the agreement was made, the plaintiff made the down payment, and he signed certain papers in blank; he was given possession of the car at the time of the sale with the agreement by the defendants, or one of them, to endorse the certificate of title over to him within a week of the agreement; the plaintiff performed his part of the agreement but the defendants failed to present the plaintiff with a certificate of title; the plaintiff was deprived of the use of the auto, could not procure license plates, and had his driving privileges jeopardized; and the defendants, or one of them, have wrongfully repossessed the car from the plaintiff and converted and sold it to another party. The defendants' answer denied all the material allegations of the complaint.

From the evidence it appears that the plaintiff is a resident of Rockford; the defendant Gene Marchesi owns a retail automobile business in Freeport, and does business as the Freeport Lincoln-Mercury Co.; one Rufus Mathews was also a resident of Rockford and, although employed regularly by the Piggly-Wiggly Company there, he also was engaged part-time as a free lance salesman in selling cars for the defendant Marchesi in the Rockford area. In August, 1955, Mathews traded in his own car on a new 1955 Mercury which the defendant had. The transaction was accomplished by the defendant Marchesi's company, as seller, and Mathews, as buyer, entering into a conditional sales contract, which that defendant, in turn, assigned, with recourse, to the

Commercial Credit Corporation in Rockford, which handled all the auto financing for the defendant Marchesi. Mathews was given the manufacturer's statement of origin, assigned to him August 8, 1955 by the defendant Marchesi, but Mathews never surrendered it to the Secretary of State for a Certificate of Title in his name. In October, 1955, Mathews undertook to sell this car to the plaintiff, upon the plaintiff's paying \$270.00 cash, which he did, and taking over the future monthly payments, the plaintiff having seen the car at Mathews' home, and they being friends, and in doing so Mathews took the plaintiff to the Commercial Credit Corporation in Rockford, where a transfer of interest agreement, dated October 31, 1955, was executed by Mathews, the plaintiff, Commercial Credit Corporation, and Freeport Lincoln-Mercury Co. Mathews later signed a purported second assignment of the manufacturer's statement of origin, dated December 26, 1955, which purported second assignment, among other things, "certifies that the vehicle is new and has not been registered in this or any other State", but Mathews apparently carried it around in his billfold and did not give it to the plaintiff or do anything else with it until later on the defendant Marchesi's company obtained it back from Mathews. The plaintiff gave Mathews some money for license plates to be issued the plaintiff and he was given a sticker to place on the car pending receipt of license plates from the Secretary of State. He never received a certificate of title.

The plaintiff made 10 regular monthly payments of \$70.00 each on the conditional sales contract but stopped doing so after July 20, 1956 when he found he could not obtain a title or license plates from the Secretary of State for the reason that the manufacturer's statement of origin was not produced from or by Mathews, and the Secretary of State would not issue a title in the plaintiff's name until Mathews took out a title in his name and then transferred it to the plaintiff. The plaintiff later got the money together to pay off the balance and had apparently made repeated unsuccessful requests of Commercial Credit Corporation, the defendant Marchesi, and Mathews for the certificate of title or manufacturer's statement of origin. Commercial Credit Corporation evidently did not have and never had in its possession any certificate of title on the car. The car was later repossessed and a \$43.50 deficiency was collected from the plaintiff. As late as January, 1958 a Freeport collection agency for the defendant Marchesi's company wrote the plaintiff in an effort to collect an alleged "delinquent account" of \$324.07 "owing them". There was also evidence that Mathews had actually sold some cars in 1955 for the defendant Marchesi, had displayed cars for sale at picnics which bore dealer's licenses, and had carried literature in his car referring to the automobiles sold by the defendant Marchesi's company and having that name on the literature. The plaintiff said he knew Mathews was a car dealer because Mathews had the pictures of the cars, other people had bought cars from him, he did not say he owned the cars, but was selling them, and about 15 or 20 people had bought cars from him. The present suit is to recover the money paid on the car by plaintiff to Commercial Credit Corporation, (\$700.00), his down payment on the car to Mathews, (\$270.00), and the deficiency assessed against him by reason of the repossession (\$43.50).

The principal issue is whether there was sufficient competent evidence to establish that Rufus Mathews was the agent of or was holding himself out as an agent of the defendant Gene Marchesi, d/b/a Freeport Lincoln-Mercury Company in the dealings with the plaintiff.

The defendant-appellant urges the judgment should be reversed because: (1) there is no proof that Rufus Mathews was the agent of Gene Marchesi, (2) the third amended complaint does not state a cause of action, and (3) there is a fatal variance between the allegations and proof.

Some of the principal evidence relied upon by the plaintiff to sustain this judgment, in addition to the foregoing, is the testimony of Paul Di Modica, who was called as a witness on behalf of the defendants. He testified that he was the office manager of the defendant Marchesi's Freeport Lincoln-Mercury Co., and had held that position since 1950; defendant sold this auto to Rufus Mathews; Di Modica typed out the invoice; Mathews traded in a car on which he had personal license plates; there was a conditional sales contract, which was assigned with recourse by the defendant Marchesi's company to Commercial Credit Corporation; Mathews was given a manufacturer's statement of origin, on which the first assignment thereof was executed by the defendant Marchesi's company; the first that defendant Marchesi knew the plaintiff could not get a title was about March 20, 1956, and he called Mathews to see what had been done with the statement of origin, and Mathews had it, and Di Modica was not able to get it until October, 1956; Rufus Mathews was a so-called "bird-dog" for the defendant Marchesi; he meant by that that Rufus Mathews brought prospective customers over from Rockford to whom the defendant Marchesi might sell cars; Mathews was not on the payroll; he

brought over other customers; Mathews was known as a free lance salesman and he was doing that in 1955; Rufus Mathews would buy a car from Gene Marchesi like this here and drive it awhile and get somebody to buy it from him; Di Modica would see Mathews a couple of times a month; in order to finance the car for Mathews, it was necessary to secure the financing through the Commercial Credit Corporation, and Gene Marchesi would have to approve all of the deals; Mathews could not obtain his own financing in these matters, the defendant Marchesi's company obtained the financing and assigned the papers with recourse; Mathews was selling cars for Gene Marchesi and sometimes sold one of his own, that through this type of salesman the defendant, Gene Marchesi, was able to sell generally throughout the area, for they did not have an office in Rockford; he knew of transactions that came in to the company through Mathews' selling cars; the defendant Marchesi's company later ceased business dealings with Mathews because he owed them so much money; Mr. Marchesi just got sick and tire of Mathews, - every customer he brought over Marchesi lost money on; Mr. Di Modica admitted that the defendant Marchesi repossessed this car, Marchesi finally got the manufacturer's statement of origin back from Rufus Mathews after the car had been repossessed, it was re-sold to a third party, and the company then assisted that new purchaser in getting a certificate of title and a license for the car, and they apparently had no trouble getting such.

The burden of proof was upon the plaintiff to prove the existence of the alleged agency between Rufus Mathews and the defendant Gene Marchesi, d/b/a Freeport Lincoln-Mercury Company: STONE v. STONE (1950) 407 Ill. 66. An agent is a person employed

by another to act for him: BARNARD etc. v. SPRINGFIELD etc. CO. (1916) 274 Ill. 148. The source of an agent's authority is the principal, and the power of the agent can only be proved by tracing it to that source in some word or act of the alleged principal: MERCHANTS' NAT. BK. of PEORIA v. NICHOLS etc. CO. (1906) 223 Ill. 41. An agency cannot be proved solely by the mere acts or declarations of the alleged agent out of the presence of the alleged principal and not subsequently approved by him when the fact of agency is in issue in a case where the alleged principal is a party: CITY OF CHICAGO etc. v. JEWISH CONSUMPTIVES etc. SOCIETY (1926) 323 Ill. 389; FREDRICH v. WOLF et al. (1943) 383 Ill. 638.

But, an agency may be established and its nature and extent shown by parol evidence, whether it be direct or circumstantial; reference may be had to the situations of the parties and the property, the acts of the parties, and other circumstances germane to the question; and where the evidence shows one acting for another under circumstances implying a knowledge on the part of the supposed principal of such acts a prima facie case of agency is established: MITCHELL et al. v. MEYER ASSOCIATES, INC. et al. (1935) 360 Ill. 278.

And a principal is bound equally by the authority which he actually gives his agent and by that which by his own acts he appears to give, - apparent authority in an agent is such authority as the principal knowingly permits the agent to assume or which he holds his agent out as possessing: FABER-MUSSEY CO. v. WILLIAM E. DEE CLAY MFG. CO. (1920) 291 Ill. 240; even though no express authority is conferred upon an agent, his acts and contracts within the scope of the apparent authority conferred upon him are binding upon the principal: TREEPORT JOURNAL-STANDARD PUBLISHING CO. v. FREDERIC W. ZIV CO. (1952) 345 Ill. App. 337.

We believe there was sufficient competent, relevant, and material evidence, direct and circumstantial, reference being had to the situations of the parties and the property, the acts of the parties, and other circumstances germane to the question, of Rufus Mathews' acting for the defendant Gene Marchesi, S/t/a Freeport Lincoln-Mercury Company under circumstances implying a knowledge on the part of Marchesi of such acts, from which and the reasonable inferences and implications therefrom and intendments thereof the trial court could reasonably conclude that Rufus Mathews was the agent of the defendant Marchesi for the purpose here concerned and was acting within his apparent authority. Particularly persuasive is the evidence of that defendant's own office manager that Mathews was a so-called "bird dog" for that defendant; he brought prospective customers from Rockford to that defendant at Freeport; he was a free lance salesman; he would buy a car like this, drive it awhile, and get somebody to buy it from him; the office manager saw Mathews frequently; that defendant obtained the financing for Mathews in these matters and assigned the papers to Commercial Credit Corporation with recourse; through this type of salesman that defendant was able to sell generally throughout the area as they had no office in Rockford; ultimately that defendant ceased business dealings with Mathews (which he couldn't have done unless they'd been having business dealings before); that defendant lost money on the customers Mathews brought over; and the apparent ease with which that defendant ultimately got the statement of origin back from Mathews and assisted the new purchaser in getting a certificate of title and license. Significant also are the facts and circumstances of the relatively short interval of time between the

ostensible assignment in August, 1955 by that defendant of the manufacturer's statement of origin ostensibly to Mathews and Mathews' ostensible agreement in October, 1955 with the plaintiff; that Mathews never surrendered that statement of origin to the Secretary of State and never obtained a Certificate of Title in his name; that Mathews did not purport to sign the second assignment of the statement of origin until December 26, 1955, did not give it to the plaintiff, kept it, and Marchesi later obtained it from Mathews, and it certifies the vehicle to be new and never registered anywhere; that the defendant Marchesi was trying to collect an alleged delinquent account from the plaintiff; and that Mathews had displayed cars for sale in Rockford bearing dealer's licenses, had had the defendant Marchesi's sales literature in cars, did not say he owned, but was selling, cars, and others had bought cars from him. The court's conclusion was not contrary to the manifest weight of the evidence. That there may have been some evidence to the contrary, or from which possibly contrary inferences or implications might be drawn, does not mean the conclusion the court reached is contrary to the manifest weight of the evidence. And that there may have been some incompetent, irrelevant, and immaterial evidence introduced is of no significance, under the circumstances, where there is a sufficient basis, as there is, for the Court's determination in other competent, relevant, and material evidence. The matter having been tried without a jury it is to be presumed the court disregarded any incompetent, irrelevant, and immaterial evidence.

The third amended complaint, though not a model of a well drawn pleading, does sufficiently state a cause of action.

Under the Uniform Sales Act, CH. 121 1/2 ILL. REV. STAT., 1955, where the obligation of either party to a contract to sell or a sale is subject to any condition which is not performed, such party may refuse to proceed with the contract or sale, and if the other party has promised that the condition should happen or be performed, such first mentioned party may also treat the non performance of the condition as a breach of warranty, and where the property in the goods has not passed the buyer may treat the fulfillment by the seller of his obligation to furnish goods as described and as warranted expressly or by implication as a condition of the obligation of the buyer to perform his promise to accept and pay for the goods (par. 11); there is an implied warranty by the seller that the buyer shall have and enjoy quiet possession of the goods as against any lawful claims existing at the time of the sale (par. 13); it is the duty of the seller to deliver the goods, and of the buyer to accept and pay for them, in accordance with the terms of the contract to sell or sale (par. 41); where there is a breach of warranty by the seller, the buyer may, at his election, rescind the contract, refuse to receive the goods, or return them, or offer to return them, and recover the price or any part thereof which has been paid (par. 69); and nothing in that act affects the right of the buyer to recover money paid where the consideration for the payment of it has failed (par. 70).

And under the then Uniform Motor Vehicle Anti-Theft Act, CH. 95 1/2 ILL. REV. STAT., 1955, the Secretary of State shall not register (for licenses) any motor vehicle unless and until the owner shall make application for and be granted an official certificate of title, and the owner shall not operate or permit the oper-

ation of any such motor vehicle upon any highway without first obtaining a certificate of title (par. 76); no dealer shall sell or otherwise dispose of a new motor vehicle to a consumer without delivering to such consumer a manufacturer's certificate executed in accordance with this act and with such assignments thereon as may be necessary to show title in the purchaser (par. 76a); the application for a certificate of title shall be made upon the appropriate form furnished or approved by the Secretary of State, - such application for a certificate of title for a new motor vehicle shall be accompanied by the manufacturer's certificate referred to in par. 76a, - and whenever application is made for a certificate of title for a motor vehicle for which none previously has been issued in Illinois the application shall include a bill of sale or statement of transfer by the seller (par. 77); and the Certificate of Title must be assigned and delivered to any purchaser or transferee (par. 80).

The plaintiff could not register this motor vehicle for licenses or legally operate it until he made application for and obtained a certificate of title. He was never given a manufacturer's certificate or statement of origin with an appropriate assignment thereon. The vehicle being either a new motor vehicle, or one for which a certificate of title had not previously been issued in Illinois, the plaintiff could not make application for a certificate of title because he had no such manufacturer's certificate or statement of origin to accompany his application.

The obligation of the plaintiff buyer being subject to a condition on the part of the Seller to sell, transfer, or assign all right, title, and interest in this motor vehicle and to see that he received a certificate of title, which was not performed,

the plaintiff might properly refuse to proceed with the contract and treat the non performance of the condition as a breach of warranty by the seller and treat the fulfillment by the seller of his obligation to furnish the goods as a condition of the obligation of the buyer to perform his promise to accept and pay for such. There was an implied warranty by the Seller that the plaintiff should have and enjoy quiet possession of the vehicle. It was the seller's duty to deliver the goods in accordance with the terms of the contract. There being a breach of warranty by the seller the buyer might properly rescind, refuse the goods, and recover the price or any part thereof which had been paid.

The consideration for the plaintiff buyer's payments failed. He may recover at least the money paid: TYLER et al. v. BAILEY (1873) 71 Ill. 34; HOWE MACHINE CO. v. WILLIE (1877) 85 Ill. 333; cf. HOWE MACHINE CO. v. ROSINE (1877) 87 Ill. 105. Generally similar situations were presented in GOLDBERG v. MINERVA AUTOMOBILES INC., et al. (1934) 278 Ill. App. 217, and FRUEHAUF TRAILER CO. v. LYDICK (1944) 325 Ill. App. 28. And nothing in the Uniform Sales Act affects the right of the plaintiff buyer to recover money paid where the consideration for the payment of it has failed.

Nor is there any fatal variance between the material allegations and the proof. The defendant's argument on this is, in substance, that though certain things are alleged to have been done by, or certain things are alleged to have occurred as to, or certain things are alleged to have not been done by, the defendant Marchesi, the only proof is that such were done by, or occurred as to, or were not done by, Rufus Mathews, and not by, or as to, or not done by the defendant Marchesi. What we have already said as to the

agent-principal relationship between Mathews and Marchesi, the basis in the evidence for the Court's conclusion on that, and that such is not contrary to the manifest weight of the evidence, is sufficient to indicate why there is no fatal variance.

In his argument on that last contention the defendant also urges that the rental value of the motor vehicle for the period the plaintiff supposedly used the car should have been taken into account and set off. There is nothing in the defendant's points and authorities as to that. No authorities are cited in support thereof. The defendant's answer says nothing whatever about that. And the record is obscure as to whether that matter was ever presented to the trial court. Under the circumstances, the argument is not tenable on this appeal.

The judgment will, accordingly, be affirmed.

A F F I R M E D

Wright, J. Concur.

SOLFISBURG, P.J. AND WRIGHT, J. CONCUR.

$$m = \frac{1}{2} \left(\frac{1}{\lambda} + \frac{1}{\lambda'} \right) \quad \text{and} \quad n = \frac{1}{2} \left(\frac{1}{\lambda} - \frac{1}{\lambda'} \right)$$

1. *Chlorophyll a* (Chl *a*)

Figure 1. The effect of the concentration of the *Agrobacterium* suspension on the transformation efficiency of *Agrobacterium* strains.

$$Z = \frac{1}{\sqrt{2\pi}} \int_{-\infty}^{\infty} e^{-\frac{1}{2}x^2} dx = 1$$

1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620, 2621, 2622, 2623, 2624, 2625, 2626, 2627, 2628, 2629, 2630, 2631, 2632, 2633, 2634, 2635, 2636, 2637, 2638, 2639, 2640, 2641, 2642, 2643, 2644, 2645, 2646, 2647, 2648, 2649, 2650, 2651, 2652, 2653, 2654, 2655, 2656, 2657, 2658, 2659, 2660, 2661, 2662, 2663, 2664, 2665, 2666, 2667, 2668, 2669, 2670, 2671, 2672, 2673, 2674, 2675, 2676, 2677, 2678, 26

[illegible]

47754

JULIUS S. CORDELL, individually and as
Executor of the Estate of Catherine
Bright, deceased, and as Trustee under
and by virtue of the last Will and
Testament of said Catherine Bright,
deceased,

Plaintiff - Appellant,

v.

CATHERINE BRIGHT,

Defendant - Appellee,

CYRUS STOKES and RUTH POWELL STOKES,

Co-Defendants.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

MR. JUSTICE BURMAN DELIVERED THE OPINION OF THE COURT.

Plaintiff, individually and as Executor of the Estate of Catherine Bright, deceased, filed a complaint in the Superior Court of Cook County on August 26, 1958, for a declaratory judgment to construe the provisions of the will of the deceased. A motion to strike and dismiss the complaint was sustained and the complaint dismissed. Plaintiff appeals.

The well pleaded allegations of the complaint are admitted on the motion. The Last Will and Testament of Catherine Bright, deceased, was admitted to probate on January 8, 1958, and plaintiff was appointed and qualified as Executor in accordance with the provisions of the will. The testatrix demised a parcel of real estate to her daughter, Catherine Bright, situated at 5264 South State Street in Chicago and a parcel of real estate to the plaintiff individually and situated at 5266 South State

Street, Chicago. The will provided further that in the event that her daughter, Catherine, should not attain her majority or be married at the time of testatrix death then the plaintiff was appointed as trustee on behalf of her daughter. After making various specific bequests the will further provided that all of the remainder of the estate would be held in trust under the control of the plaintiff as trustee and as guardian of her daughter. It also provided that the plaintiff, as trustee, should collect and receive rents, etc., and pay a stipulated sum of money to the daughter Catherine until she reaches the age of twenty-one years and then to transfer to her the corpus of her share. Catherine Bright died on August 23, 1957, and at the time of her death, her daughter, had not yet attained her majority and was not married, and the plaintiff as Executor and as trustee entered upon his duties to preserve the assets of the estate. On March 13, 1958, the City of Chicago served notice on him to correct numerous violations of City Ordinances in connection with the premises at 5266 South State Street and threatened plaintiff with penalty proceedings if the corrections were not made within ten days. For this reason plaintiff was compelled to institute forcible entry and detainer against all of the tenants in the building and obligate himself for several thousands of dollars in making the repairs for the extensive remodeling necessary to comply with the demands of the City.

Catherine Bright, legatee, claims that the Last Will of her mother does not create a trust and that there is no devise to the plaintiff of the property at 5266 South State Street and that she is the sole owner. On October 7, 1958, she filed a bill in the Circuit Court to set aside the will of her mother and afterwards filed a motion in the instant case to dismiss the complaint alleging that the present suit to construe the will was premature because the issue in the will contest must first be determined before the Superior Court could entertain a complaint to construe the will.

A complaint in declaratory judgment suit must disclose an actual controversy. (The Exchange National Bank of Chicago v. Cook County, 6 Ill. 2d 419). Where an actual controversy exists, the complaint should not be dismissed; the proper practice is for the court to enter an order declaring the rights of the parties. (Burgard v. Mascoutah Lumber Co., 6 Ill. App. 2d 210). The complaint in the instant case discloses an actual controversy and was substantiated by defendant when she later filed her complaint to set aside the will. It is established by the record before us that the plaintiff is acting as the executor and trustee of the will and therefore has the duty to preserve the assets of this estate and to manage and control the real estate involved. Under the circumstances he is entitled to have the court pass upon the expenditures of moneys necessary for the maintenance and repairs of said properties. The remedy of declaratory judgment is designed to

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avoid litigation and to settle and fix rights before there has been an irrevocable change of position of the parties. We also find that the complaint complies with the requirements of Chap. 110, Sec. 57.1 of the Practice Act which provides that the Court shall refuse to enter a declaratory judgment, decree or order, if it appears that the judgment, decree or order would not terminate the controversy or some part thereof.

The filing of a suit to contest a will does not abate the administration of an estate. Many controversial situations arise before the final determination of a will contest. The Probate Court does not have the required jurisdiction to determine the proper management of Real Estate and the instant proceeding can easily be used for that purpose without impinging upon the pending will contest.

REVERSED AND REMANDED.

MURPHY, P.J. AND KILEY, J. CONCUR.

ABSTRACT ONLY.

47834

TYPE & PRESS OF ILLINOIS, INC.,
an Illinois corporation,

Appellee,

v.

LEONARD GORTER, individually and
d/b/a STANDARD CARTAGE COMPANY,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

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MR. PRESIDING JUSTICE MURPHY DELIVERED THE OPINION OF THE COURT.

Plaintiff sues to recover for the loss of a used printing press, which was destroyed by fire while in defendant's garage. A jury trial resulted in a verdict and judgment for \$11,500. Defendant appeals from the judgment and denial of post-trial motions.

The trial was conducted on alternate theories that "the defendant was acting either as a common carrier of property or as a bailee for hire." The court denied defendant's motion to exclude from the jury the common carrier issue, and the instructions given to the jury followed both theories.

On April 7, 1958, plaintiff sold to L. A. Lee Company of Dalton, Georgia, a used printing press, purchased by plaintiff about ninety days before, and which was in operation and on the premises of Inland Press at 328 South Jefferson Street, Chicago. The sale price was \$12,500, and the sales invoice set forth that the press was to be "dismantled and blocked securely on board Huber & Huber truck f.o.b. Chicago. Trailer to be sealed."

The alley in back of 328 South Jefferson was too narrow for the large freight truck of Huber & Huber to get to the loading dock, and defendant, who was in the business of moving and hauling printing machinery, was employed by plaintiff to transport and "overload" the press on to the Huber & Huber truck at defendant's garage about a mile and one-half away.

On April 8 and 9, the press was dismantled by plaintiff's employees, and on April 10, defendant's employees finished loading the dismantled press on defendant's truck at 328 South Jefferson late in the day. The press was driven to defendant's garage to remain overnight and to be loaded on the Huber & Huber truck the following morning. During the night the press was destroyed by fire.

Defendant asserts that the statement of claim fails to state a cause of action because it does not allege any "proprietary interest" of the plaintiff in the printing press.

The complaint alleges defendant was a common carrier, and that he received the press from plaintiff in good order, for delivery to a specified destination, and failed to carry the press safely, and "negligently permitted said press to become wholly and totally destroyed by fire, to plaintiff's damage in the sum of \$14,000.00."

The question of whether a complaint absolutely fails to state or indicate any ground of liability which the law will recognize can be raised at any time. (Wagner v. Kepler, 411 Ill.

368 (1951).) We believe the instant complaint clearly informed defendant of the nature of plaintiff's claim, the basis on which liability was predicated, and that plaintiff was suing as owner. The complaint contains nothing from which it could be inferred or argued that any other party had any ownership of the press. We conclude the statement of claim does state a cause of action.

Defendant argues title passed to L. A. Lee Company on April 7, 1958, date of the sales invoice and, therefore, plaintiff had no right to bring this action. We do not agree. The press was damaged while in the possession of a transportation agency selected and employed by plaintiff for delivery to the place agreed upon by the seller and the purchaser. Rule 5 of Section 19 of the Illinois Sales Act provides that if the seller is to deliver the goods at a particular place, title does not pass until the goods have reached the place agreed upon, and this is the general rule as stated in 77 C.J.S. 1045. There is nothing in the instant record to show a contrary intention. Therefore, plaintiff was the proper party to bring this suit.

Defendant, although admitting being a common carrier in "some of its business operations," contends that in the instant transaction he was hired as a machinery mover and loader only, and at the most was a mere bailee of the merchandise and, as such, the common carrier evidence and instructions were highly prejudicial.

The evidence shows defendant quite regularly loaded presses on to highway carriers for plaintiff "from different locales in Chicago"; that as to the instant case, "our engagement * * * included the carrying of the press from Jefferson Street to Washburne and then delivering it to Huber & Huber by placing it aboard their truck"; that the bill of lading was directed to Huber & Huber, as carrier, and defendant was to get a copy signed for plaintiff, which was the procedure in previous cases; that after the press was loaded on defendant's truck, it was driven to his garage to be kept in the garage that night because of the late hour. "It would have run into excessive overtime to overload that truck the same evening."

What constitutes a common carrier is a question of law, but whether one charged as such is within the definition is a question of fact. The burden of proving exoneration is always upon the carrier. (Meyer v. Rozran, 333 Ill. App. 301, 306 (1948).) It is a general rule that truckmen employed to carry goods from one part of the city to another are to be regarded as common carriers when they undertake to carry goods for hire for the public generally and as a common employment. (Hinchliffe v. Wenig Teaming Co., 274 Ill. 417, 422 (1916).) While the goods are being held for delivery to the connecting carrier, who has not refused them, the fact that the goods are stored in a warehouse does not affect the operation of the rule. There must be an actual or constructive delivery to the connecting carrier before the initial carrier can relieve itself from responsibility under its contract. Wilson & Co., Inc. v. Werner Transportation Co., 330 Ill. App. 25 (1946); 13 C.J.S. 913.

Whether a transportation agency is a common carrier depends upon what it does, and although rates and bills of lading may be embraced in the service of a common carrier, we do not believe they are indispensable characteristics. The services rendered by defendant involved a link in the transportation of the press, and the method of fixing the charge is not determinative. (United States v. California, 297 U.S. 175 (1936).) The answer of plaintiff's witness that defendant "could have refused this job if he wanted to," has no probative value on the question of whether defendant held himself out as engaged in public service for all persons indifferently, as to the kind of property carried by him. The manager of the defendant testified, without contradiction or limitation, "We do printing machinery moving and hauling." Defendant introduced no evidence to negative the right of the public to use his facilities for carrying the particular kind of property carried by him, or to show that he did not serve all of the public who applied for his particular services.

We conclude the evidence in this record tends to show that he was acting as a common carrier in the instant transaction, sufficient to make it a question of fact to be determined by the jury under proper instructions. We have examined the instructions on this question and believe the jury was properly instructed on this point.

The alternate theory, for which defendant contends, is that he was a mere bailee. He argues that the evidence showed no negligence on his part, and that it was error for the court, over objection, to give the traditional Illinois bailor-bailee instruction.

Defendant's witnesses testified they were unable to find out what caused the fire; that the second floor was used as a workshop, in which skids, crates and boxes were made; that the fire came from the second floor; and that there were manual type of fire extinguishers but no watchman.

We see no reason in this case to depart from the rule that where a bailee receives property and fails to return it, the presumption arises the loss was due to his negligence, and the law imposes on him the burden of showing that he exercised the degree of care required by the nature of the bailment. (Kammerer v. Graymont Hotel Co., 337 Ill. App. 434 (1949).) Whether the defendant, as bailee, met the burden of showing that the damage to the bailed property, by fire, occurred without his fault, was a question of fact for the jury to decide, with all the inferences or conclusions to be drawn from the evidence. (Brenton v. Sloan's United Storage & Van Co., 315 Ill. App. 278, 282 (1942); Bielunski v. Tousignant, 17 Ill. App.2d 359, 363 (1958).) Here, the defendant rested his defense on the proposition that the cause of the fire was unexplained and, therefore, there was no negligence on his part as a matter of law. Henderick v. Uptown Safe Deposit Co., 21 Ill. App.2d 515 (1959) does not support the argument of defendant that testimony adduced by plaintiff under Section 60, that the cause of the fire was undetermined, removes the presumption of negligence and prevents plaintiff from relying on the presumption. We find no error in the trial court giving a bailor-bailee instruction, which included "the law presumes negligence on the part of the bailee and imposes on the bailee the burden of showing that the loss did not result from his negligence."

Defendant contends that in this case the measure of damages is the fair and reasonable value of the press on the day it was destroyed by fire (N.Y., C. & St. L. R. R. Co. v. American Transit Lines, 408 Ill. 336 (1951)), and argues that plaintiff's evidence is not proof of reasonable value. Plaintiff's evidence as to damages consisted of the sales invoice showing the sales price of \$12,500, and testimony that plaintiff realized \$1,000 salvage. Defendant introduced no evidence on the question of damages or salvage value.

The bill of lading, which defendant was to have signed by Huber & Huber, shows the used press was consigned to L. A. Lee Company at Dalton, Georgia, and as plaintiff had used defendant "in all our sales of this nature for the purpose of moving machinery," it is a reasonable assumption that defendant knew the press had been sold, and that he was being employed for the express purpose of enabling plaintiff to complete a sale. Defendant contracted to transport the press to a specified destination and is chargeable for the loss occasioned by the breach of his contract, which resulted in failure of delivery and incompleteness of plaintiff's sale. We believe the proper measure of damages is the contract price of the press less its salvage value after the fire (Euston & Co. v. Erie R. R. Co., 147 Ill. App. 594 (1909); Deming v. Grand Trunk R. R. Co., 48 N. H. 455 (1869)), whether the defendant was acting as a common carrier or as a bailee. In this case, the sales invoice was

prima facie evidence of the contract price. There is no evidence to show that the sale was not free and voluntary, or not made in good faith, or in any manner not a bona fide sale. Cloyes v. Plaatje, 231 Ill. App. 183 (1923); Budd v. Van Orden, 33 N. J. Eq. 143 (1880).

The court was correct in refusing to allow defendant to interrogate plaintiff as to the price plaintiff paid for the press within ninety days previous to its sale by the plaintiff, or as to plaintiff's profit, if any, made by a replacement sale to L. A. Lee Company at a later date. Both lines of questioning were improper. Any loss taken by plaintiff in the original sale to L. A. Lee Company, or from a replacement sale, obviously could not be used in computing plaintiff's damages, and the same rule should be applied to any gains it may have made in either sale. The instruction given on the measure of damages correctly sets forth the rule we believe should be applied in the instant case.

In conclusion, we believe the jury reached a correct result on either theory, and that substantial justice has been done. The denial of defendant's post-trial motions was proper. Therefore, the judgment of the trial court is affirmed.

AFFIRMED.

KILEY AND BURMAN, JJ., CONCUR.

ABSTRACT ONLY.

BENNIE KERKES,

 V_s

Defendant-Appellant.

SUPERIOR COURT

COOK COUNTY

This is an appeal from a judgment in a personal injury case. The jury returned a verdict for the plaintiff in the amount of \$15,000. A motion for a new trial was denied.

"The 'weight of the evidence' terms of the trial court -- that is, 'the greater weight of the evidence,' or, 'the preponderance of the evidence,' or, 'beyond a reasonable doubt,' are terms of definite connotation, even to nonprofessional minds. In fact, the Supreme Court has said that it is not even proper to try to define to the jury, by instruction, the term 'beyond a reasonable doubt'; that it means exactly what the words say. *People v. Davis*, 406 Ill. 215. However, the term contrary to the 'manifest weight of the evidence' has no such definite connotation to the lay minds, and indeed its interpretation and application has caused serious contention between lawyers and between jurists."

"Where disputed questions of fact are presented to a jury and the jury passes upon them, unless palpably erroneous, the finding of fact will not be disturbed by the reviewing court. People v. Hanisch, 361 Ill. 465; Krug v. Armour & Co., 335 Ill. App. 222; Becherer v. Belleville-St. Louis Coach Co., 322 Ill. App. 37; Rembke v. Bieser, 289 Ill. App. 136; Leahy v. Morris, 289 Ill. App. 99. It is not the province

of the court to substitute its judgment for that of the triers of fact, where there is a conflict in the evidence. *Becherer v. Belleville-St. Louis Coach Co.*, supra; *Martin v. Village of Patoka*, 305 Ill. App. 51. It is the province of the jury alone, to determine the weight of the evidence and the credibility of witnesses. *Rembke v. Bieser*, supra. To be against the 'manifest weight of the evidence' requires that an opposite conclusion be clearly evident. *Olin Industries, Inc. v. Woellner*, 1 Ill. App.2d 267; *Schneiderman v. Interstate Transit Lines, Inc.*, 331 Ill. App. 143, 147."

The plaintiff in this case testified in his own behalf. He testified that the injury was received when he stood to permit a woman seated next to the window to pass. He claims that at that point, the bus made a sudden swerve and he was thrown to his knees. Two statements were used by defendant in an effort to establish that the injury complained of was a pre-existing impairment. Each of the statements indicated that there had been an injury to the knee prior to the date in question, and one contained a reference to an operation on the knee. The circumstances surrounding the making of the statements were repeatedly explained and the truth of the contents was repeatedly denied by the plaintiff. Thus, a question for the jury was presented. Defendant's bus driver testified that he did not see the fall, that the plaintiff's uniform showed no signs of a fall and that there was no sudden swerve during his approach to Indiana Avenue. However, he was not sure that he looked to the rear of the bus before he came to a stop, testified that plaintiff's actions at the end of the line were consistent with those of a man who had been injured and acknowledged that he had placed plaintiff in the care of the police after talking

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with his supervisor. The weight to be attributed to the driver's testimony was within the realm of jury questions. There was testimony that the hospital records contained a report of treatment given the plaintiff in the emergency room on the date in question and that the plaintiff was delivered to the hospital by policemen. These facts are all corroboration that he was at the hospital on that date. Plaintiff was also treated by his own doctor on the same date and the description of what was found by him and by the surgeon who later operated on the knee was before the jury. These are all collaterally but substantially corroborating and could be the basis for a finding of fact by the jury. We do not feel that we could say their finding is contrary to the manifest weight of the evidence because it is not inherently unlikely.

Appellant urges that there is a further error in the interrogation of a witness by the court and that that was a cause of prejudice to the jury. It is perfectly proper for the court, being in charge of the trial of the case, to ascertain the facts which he thought were important and pertinent. In this case all that the court did was ascertain the facts and the question asked is not to be condemned.

In *Schwab v. Chicago Consolidated Trac. Co.*, 155 Ill. App. 643, at page 646, the court said:

"It is objected that the court made improper remarks prejudicial to appellant. One of defendant's witnesses testified that plaintiff 'rushed right past me and jumped off.' The court thereupon inquired, 'Didn't you say he jumped off the car?' The witness replied, 'Yes sir.' No

objection appears to have been made at the time and no exception was taken. If there had been objection, the contention that the question of the court was prejudicial is based on mere conjecture and so far as the record shows does not appear to be well founded. It is the duty of the trial judge to listen to and endeavor to comprehend testimony. If he does not hear it or if it is in any respect ambiguous, we know of no reason why he may not ask the witness to make it clear. No basis exists in principle or precedent so far as we are aware which requires him to be a mere automation. It is not of course proper for a trial judge to endeavor to influence a jury upon questions of fact which are exclusively within the jury's province. We find no reasonable cause to suppose the remark of the court referred to was prejudicial."

This seems controlling to us, and is so near our present situation that we find that there is no prejudice to the appellant by the court's action. In this case, the testimony of the doctor was restated and was therefore not a prejudicial remark. It had been the result of a long case of continuous questions whose import was the remarks directed to the doctor. His answers to the questions of the court were not prejudicial but were merely a clarification of what had been said before. The judge is in charge of the trial and it has been properly said in *People v. Lurie*, 276 Ill. 630, at page 641:

"It is important, however, that the trial judge should also become acquainted with the facts, and on this account he may, if necessary to ascertain them, propound questions to the witnesses. It is the judge's duty to see that justice is done, and where justice is liable to fail because a certain fact has not been developed or a certain line of inquiry has not been pursued it is his duty to interpose and either by suggestions to counsel or an examination conducted by himself avoid the miscarriage of justice, but in so doing he must not forget the function of the judge and assume that of the advocate."

Appellant also complains of the failure of the court to give his tendered instruction 18. This was a peremptory

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instruction which directed a verdict and told the jury that the plaintiff could not recover if he fell by some other cause than the negligence of the defendant. There is no evidence in the record that he fell by some other cause than the negligence of the defendant. The only evidence in the record is the evidence of the plaintiff and it is that he fell when the defendant's driver swerved the bus in an effort to stop at Indiana Avenue. Therefore it would have been error to have given the instruction which was tendered. In addition to that, all of the elements of the instruction are covered at other places in the instructions. It has repeatedly been held that if the series of instructions as a whole properly instructs the jury as to the meaning of the law as a whole, the failure to give a single instruction is not reversible error. Thus, in *Duffy v. Cortesi*, 2 Ill.2d 511 at page 515, the court said:

"The trend of judicial opinion reveals a reluctance to reverse cases on the ground of technical errors in instructions; hence, courts have reiterated that the instructions will be considered as a whole, and where the jury has not been misled, and the complaining party's rights have not been prejudiced by minor irregularities, such errors will not be deemed grounds for reversal. (*Kavanaugh v. Washburn*, 320 Ill. App. 250; *Stephens v. Weigel*, 336 Ill. App. 36; *Anderson v. Brown*, 340 Ill. App. 613.)"

We therefore conclude that these instructions are not reversible error and that the judgment of the court in failing to give the tendered instruction was a correct one.

We believe that the errors alleged by appellant are not sufficient to reverse the verdict and ~~that~~ the judgment is therefore affirmed.

AFFIRMED.

BURKE and FRIEND, JJ., CONCUR.

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plaintiff had breached the contract by requesting delivery before payment of the full amount. Plaintiff's motion for judgment on the pleadings was denied. Defendant then filed a motion for judgment on the pleadings which was sustained as to \$500.00 of the amount in controversy, judgment being entered in favor of plaintiff for \$350.10. This appeal is from that judgment.

Both parties contend that the contract is unambiguous, but each contends that it sustains his own viewpoint. The question, therefore, is one of determining the true meaning of the contract. Appellant contends that the addition of certain terms to the instrument shows the intention of the parties clearly to have been to permit partial delivery before complete payment, or, in the alternative, that if the contract can be said to be ambiguous, the trial court erred in not permitting the presentation of evidence to eliminate the ambiguity. We do not find it necessary to deal with the second contention, since we believe the contract to be unambiguous in its terms, but we do not agree with appellant's contention that the contract sustains his position. On the contrary, we find that appellee's contention that full payment was a pre-requisite to delivery is correct.

The contract is a form prepared by the Novo Card Publishers, Inc. and contains the terms upon which an exclusive franchise distributorship arrangement will be formed. The printed

portions of the agreement, with the blanks properly completed, comprise an entire statement of the terms, including the nature of the merchandise, price, terms of payment, method of delivery and other conditions. The nature of the blanks to be completed clearly indicates that the printed portions of the contract contemplate payment of the full price before delivery of any part of the merchandise ordered. \$1,718.20, the full price of the order, is shown in the appropriate blank and from it is deducted \$500.00 labeled "Deposit", which is to be considered liquidated damages in the event of default by the buyer. This leaves a figure of \$1,218.20, which is labeled "Balance Due Upon Delivery". The other pertinent hand written portions appear at the bottom of the paper and are: "1/2 shipment on Feb. 1" and "Balance hold for shipping instructions".

Appellant contends that when read together, the printed term "Balance Due Upon Delivery" and the hand written terms "1/2 shipment on Feb. 1" and "Balance hold for shipping instructions" express the understanding of the parties that the payment of one-half of the purchase price would entitle plaintiff to delivery of one-half of the total order. We do not agree.

Plaintiff neglects to give proper weight to the fact that the terms "1/2 shipment on Feb. 1" and "Balance hold for shipping instructions" appear in the portion of the instrument devoted to specification of the method of delivery, which is separated from the body of the agreement wherein the terms

of payment are set forth. The payment provisions call for "Balance Due Upon Delivery" of the full amount minus the deposit, without any indication that partial payment could compel defendant to deliver a portion of the goods. After perfecting his ownership of the cards by payment of the amount called for by these provisions, plaintiff's requests concerning the mode of delivery would call for partial delivery as specified.

As the court said in *Capitol Paper Box, Inc. v. Belding Hosiery Mills*, 350 Ill. App. 68, at page 71:

"In considering the contract, we must interpret it in its entirety, and we cannot alter a contract or make a new one for the parties to sustain the claim of one of them. [citing cases]. In so doing we must give a reasonable interpretation rather than an unreasonable one which will not give one of the parties an unfair advantage over the other. [citing cases]."

We are also aware that the hand written portions are no less important than the printed. *Papulias v. Wirtz*, 331 Ill. App. 376; *American Terra Cotta & Ceramic Co. v. Bankers Surety Co.*, 199 Ill. App. 545. However, after a careful application of these principles to the present case, we are unable to say that the contract failed to state a clear agreement between the parties. The instrument is clear and understandable on its face and encompasses all the essentials of the agreement.

The court did not commit error in awarding plaintiff a judgment for \$350.10 rather than the \$859.10 prayed for in his complaint. The \$500.00 retained by defendant was

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clearly designated as a deposit to insure the performance of the contract by plaintiff and by breaching his obligations plaintiff has forfeited his right to that sum.

For the reasons indicated, the judgment of the trial court is affirmed.

AFFIRMED.

BURKE and FRIEND, JJ., CONCUR.

47780

HARRY EAGER,

Plaintiff-Appellee,

v.

JOSEPH D. BERKE and SIDNEY Z.
TEPPER,

Defendants-Appellants.

On Appeal of SIDNEY Z. TEPPER.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

In an amended statement of claim Harry Eager asked judgment against Sidney Z. Tepper in the amount of \$1,000. The defendant was escrowee with a deposit by plaintiff of \$1,000 under a contract of assignment between plaintiff and Joseph D. Berke. Paragraphs 6 to 9, inclusive, of the answer plead as a bar to the action a decree in a complaint for specific performance of the assignment of the real estate contract. The plaintiff in the instant case was the plaintiff in the first case and defendant Berke and others were the defendants. The decree dismissed the complaint for want of equity. On appeal the Supreme Court affirmed. (11 Ill. 2d 50).

The court sustained plaintiff's motion to strike the paragraphs of the answer asserting the defense of res judicata. The case came on for trial without a jury upon the amended statement of claim, the allegations of Paragraphs 1 to 5 of the answer and upon the statement of facts in Eager v. Berke, 11 Ill. 2d 50, and the court gave judgment against the defendant for \$1,000.

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He asks that the judgment be reversed and in the alternative that the cause be remanded with directions to vacate the order sustaining the motion to strike his defense of res judicata and for a new trial.

The stricken paragraphs set out the proceedings in the first case. By appropriate references these paragraphs plead that in the first case the plaintiff in his complaint asked for "such other and further relief as shall be meet." Plaintiff in the first case asked for damages. He also requested damages in his brief, reply brief and petition for rehearing in the Supreme Court. No point is made as to any issue joined in the first 5 paragraphs of the answer.

Defendant insists that he should have a reversal on the ground of res judicata in that he properly pleaded identity of parties or their privies, subject matter and cause of action. There is identity of subject matter. The amended statement of claim in the instant case alleges a different cause of action and there is no identity of parties. The defendant in the instant case was not a party to the first case and cannot be said to be in privity with any other party in that case. The court was right in striking the allegations purporting to plead res judicata.

The judgment of the Municipal Court of Chicago is affirmed.

JUDGMENT AFFIRMED.

BRYANT, P. J., and FRIEND, J., CONCUR.

47752

ALEEN B. RAGEN,

Plaintiff-Appellant,

v.

JAMES M. RAGEN, JR., et al.,

Defendants-Appellees.

CONTINENTAL ILLINOIS NATIONAL BANK AND
TRUST COMPANY,

Garnishee-Defendant,

and

THE TRAVELERS INDEMNITY CO.,

Third Party Defendant.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY

2-14-53

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

In May of 1953 Aleen B. Ragen filed a bill in the nature of a bill of review against James M. Ragen, Jr. (Ragen), and others to set aside the decree and property-settlement agreement entered into at the time of the Ragens' divorce in 1952. On the day suit was filed, without notice and without bond, plaintiff obtained a temporary injunction restraining Ragen and the other defendants from transferring or dealing in any way with any of Ragen's property. Subsequently Ragen moved to dissolve the injunction, and in December of 1956 his motion was allowed. He thereupon filed a suggestion of damages under the Injunctions Act (Ill. Rev. Stat. 1959, ch. 69, §12) to recover damages sustained by reason of the wrongful entry of the temporary injunction. After hearing proofs on the suggestion of damages,

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the chancellor, on June 30, 1958, entered judgment in favor of Ragen and against plaintiff in the amount of \$12,674.55. This judgment was included in a final decree which also dismissed plaintiff's bill of review for want of equity. Plaintiff attempted to appeal from this decree, but, pursuant to Ragen's motion, the appeal was here dismissed in November of 1958 because plaintiff had failed to file the record within the time prescribed by the rules of court. Thereupon, pursuant to Ragen's motion under section 87 of the Civil Practice Act, we entered judgment in favor of Ragen and against plaintiff in the amount of \$415.00. Later, on August 18, 1959, we denied plaintiff's petition for leave to appeal from the decree of June 30, 1958.

On the day the decree was entered (June 30, 1958), Ragen instituted a garnishment proceeding against the Continental Illinois National Bank and Trust Company. Summons was served, and the bank's answer raised the defense that it was sued in its individual capacity and not as a trustee of the Katherine C. Camp Trust or as trustee under the Will of Gordon Thorne, in which capacities it held certain assets of plaintiff. Ragen then caused a garnishment summons and interrogatories to be served on the bank in its trust capacities. In its answer the bank admitted that as trustee of the Katherine C. Camp Trust it held certain assets for the use of plaintiff, namely:

- (a) 1450 shares of Class A stock of Montgomery Ward and Company which, by the terms of a decree entered by the Circuit Court of Cook County in Thorne v. Continental Natl. Bank & Trust Co. of Chicago, 56 C 11 261, aff'd 18 Ill. App.2d 163, were to be distributed to plaintiff and her daughter Maureen Ragen as they should in writing direct; however, no such direction had been received by the bank;

- (b) \$72,850.00, which the decree provided was to be paid to plaintiff, Maureen Ragen, and attorneys Wisch and Crane, without specifying how the money was to be allocated; and
- (c) \$25,375.00, representing dividends on the 1450 shares of Montgomery Ward stock held pursuant to the decree, without specifying how the money was to be allocated as between plaintiff and Maureen Ragen.

By way of defense, the bank alleged that the Circuit Court of Cook County had retained jurisdiction in its decree, thus precluding garnishment of the assets held by the bank.

On December 16, 1958 Ragen instituted a citation proceeding pursuant to section 73 of the Civil Practice Act against the Travelers Indemnity Company, requiring it to produce the security for the supersedeas bond which plaintiff had filed in the Appellate Court in connection with her unsuccessful appeal from the decree of June 30, 1958. These two post-judgment proceedings were consolidated for trial, and as the result of hearings had on December 16 and 29, 1958, garnishment judgment was entered against the bank in the amount of \$12,991.41, representing the principal amount of the judgment for \$12,674.55 and interest in the amount of \$316.86, the judgment in the amount of \$12,991.41, plus Ragen's costs in the amount of \$415.00, to be satisfied by Travelers from the sale of certain collateral ordered to be turned over to Frank G. Sain, sheriff of Cook County, Illinois.

Plaintiff contends that the answers of the garnishee bank disclosed that there was no money or property due Aleen B. Ragen; that at the time the garnishee filed its answers it was not indebted to Aleen B. Ragen; and that it appeared from the answers

filed by the garnishee that Maureen Ragen and others had an interest in the money and stock sought to be garnisheed; that it was therefore incumbent upon the judgment creditor to issue and serve notice to them so that they might assert their rights; and that the record shows that no such notice was ever served upon Maureen Ragen or any other adverse claimant.

As to the judgment against Travelers based upon the citation proceeding, plaintiff takes the position that the Superior Court was without jurisdiction to enter such an order because (1) no evidence was adduced at the trial that Travelers was indebted to the judgment debtor, (2) no demand was ever made upon the surety to perform under the appeal bond, and (3) the collateral ordered to be sold is not within the jurisdiction of the Superior Court; and plaintiff concludes that therefore the court had no power to compel the surety to produce and deliver to the sheriff of Cook County securities which were in a foreign jurisdiction.

In the garnishment proceeding against the bank, Ragen introduced the testimony of Holly P. Blessing, a vice president who had administered the Katherine C. Camp Trust. He testified that on the day the garnishment summons was served, the bank held the assets described in the bank's answer; that on July 31, 1958, in order to induce the bank to turn over some of the assets awarded to them under the decree plaintiff and her daughter Maureen executed a letter authorizing the bank to pay attorneys Wisch and Crane \$65,000.00 of the \$72,850.00 held by the bank under the decree, and in view of Ragen's garnishment proceeding "to retain the sum of \$13,000 out of

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the amount of cash to which the undersigned [plaintiff and Maureen Ragen] would be entitled" from the bank pursuant to the Circuit Court decree of July 8, 1957, "which amount" the bank could "retain until," as the direction provided, "in your opinion, said garnishment proceedings have been finally and completely disposed of and fully determined." For the purpose of setting aside the money, Maureen Ragen authorized the bank to withhold \$10,000.00 of the amount of cash she was entitled to receive under the decree, and counsel for the bank advised it that, although Maureen Ragen was not a judgment debtor of Ragen, her express assent and direction fully protected it. During the garnishment hearings, the foregoing document was brought to the attention of counsel for the bank, whereupon he orally withdrew the defense to the garnishment based upon Maureen Ragen's potential interest in the funds held by the bank.

On August 1, 1958, several weeks after the second garnishment summons was served on the bank, it issued a check to plaintiff in the amount of \$8,124.84 and also delivered to plaintiff five certificates representing 483 shares of Montgomery Ward and Company Class A stock issued in plaintiff's name. On the day of delivery, Class A Ward stock had a market value of \$150.00 to \$152.00 per share. In the garnishment proceeding, Ragen introduced the decree entered in the Thorne case under which the bank as trustee was ordered to deliver to plaintiff and Maureen 1450 shares of Montgomery Ward and Company Class A stock, such stock to be issued as they should in writing direct the trustee,

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and to pay the sum of \$72,850.00 to plaintiff, Maureen, and attorneys Wisch and Crane. He also introduced the settlement agreement dated July 30, 1956.

As to the citation proceeding against Travelers, Warren Geary, assistant superintendent of its bond department, responded to the citation served on Travelers at its Chicago office. He testified that plaintiff had applied to Travelers for a supersedeas bond in connection with her appeal from the decree of June 30, 1958. The bond was filed in the Appellate Court on October 24, 1958. The application was handled and the bond written through Travelers' Cleveland office. As security for the bond, plaintiff gave 183 shares of Ward stock; 100 shares were delivered directly to the Cleveland office, and a certificate for 83 shares was delivered to the Chicago office, where it was held overnight and then forwarded to Cleveland. All the shares were in the custody and control of Travelers when the citation was served.

The instant proceedings were instituted to satisfy a judgment given more than fifteen months ago in a lawsuit filed in 1953. The judgment has become final. There is no quarrel with plaintiff's contentions that the garnishor must comply strictly with the Garnishment Act (Ill. Rev. Stat. 1959, ch. 62), that the garnishor has the burden of proving that the garnishee is indebted to the defendant or has any effects or estate of any such defendant in his possession, custody or charge, as provided by section 1 thereof, and that if the

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garnishee is alleged to be a debtor of the judgment debtor, the debt must be shown to be definite and certain. However, all these legal principles and statutory provisions were complied with in this proceeding. The bank admitted in its answer that, at the time garnishment summons was served, it held almost \$100,000.00 in cash and about \$215,000.00 in securities for the use of plaintiff and her daughter Maureen. Plaintiff argues that Ragen failed to prove what portion of the assets were owned by her. We recently held in *Leaf v. McGowan*, 13 Ill. App.2d 58, that where the garnishee answers that funds it holds are owned by the judgment debtor jointly with another, the garnishor has made a prima facie case, and the burden is then on the other party to the joint account to prove what part of the funds, if any, belongs to him. In this proceeding, Ragen established by clear proof, and the court found, that the bank held assets belonging to plaintiff far in excess of Ragen's judgment, and, basing its decision upon this proof, the court properly entered judgment against the bank.

Plaintiff argues that under section 11 of the Garnishment Act Maureen Ragen was entitled to notice of the garnishment proceeding. This section was evidently intended to protect an adverse claimant so that he may appear and protect his interest, if any, in property held by the garnishee. The proof is clear, however, that Maureen Ragen knew of the garnishment against her mother and that, because of the pendency of the proceeding,

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she signed an authorization to the bank to withhold \$13,000.00. Under the circumstances it is convincingly clear that she knew of the proceeding; indeed, she assisted in establishing a fund to be held by the bank to pay Ragen's judgment.

There is no merit to the defense that the court's retention of jurisdiction in its decree precluded garnishment of the assets held by the bank since the reservation of jurisdiction did not prevent plaintiff from getting her share of the settlement money and stock. It certainly did not affect Ragen's right to garnishee these assets in the hands of the bank.

The order appealed from should be affirmed, and it is so ordered.

ORDER AFFIRMED.

BRYANT, P.J., and BURKE, J., CONCUR.

904

[illegible]

APPEAL FROM CIRCUIT

COURT, COOK COUNTY

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DELIVERED THE
COURT.

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of the State Police Merit
of charges filed against
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February 20, 1958,
by the Superintendent of
These charges recited
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rticularly that of

drinking intoxicating liquors while on duty. After the period of suspension had expired, plaintiff continued on duty as a State police officer until his suspension pending disposition of the charges in question.

Four charges were made, two of which were sustained. The first charge sustained was that on November 14, 1957, while on duty and in uniform, plaintiff indulged in alcoholic liquor to the extent that he was unable to perform his duties as a State police officer while investigating an automobile accident, and that while conducting the investigation he was observed to be under the influence of liquor. The second charge sustained was that on December 26, 1956, plaintiff became intoxicated and while so intoxicated flashed and otherwise displayed a 30-30 caliber rifle and shot or discharged it into the wall of a garage located at his residence; and that he was put to bed by State police officers who were called to his home to investigate. The offenses were in violation of pertinent rules and regulations.

With respect to the first charge, Oliver K. Osburn, an employee of General Motors for twelve years, testified that while driving along the highway he observed an automobile accident, got out of his car, looked for a State police car, and found Hall. He started to ask Hall about taking care of the accident, but Hall did not comprehend what he was talking about. Osburn asked Hall if he had checked to see who was involved in the accident. There was no reply. Hall's hat

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was on backwards. He staggered as he walked. There was no attempt made at any time to keep traffic moving. Hall was 100 feet away from the cars that were involved. Osburn was of the opinion that Hall was intoxicated. State police officer John C. Cammack testified that he went to the scene of the accident upon a radio call that Sergeant Hall had reported an accident. When he arrived, he noticed Hall, did not smell any alcohol on his breath, his speech was coherent, and Cammack was of the opinion that Hall was not under the influence. Cammack was told by a Deputy Sheriff that people were complaining of Sergeant Hall; that they were of the opinion that he was drunk, and the Deputy Sheriff asked Cammack to get Hall off the scene. Cammack went to Hall and said: "Sergeant, the Deputy said people are complaining about you, why don't you go ahead and leave." Hall did not object. Hall denied that he was intoxicated; explained his hat being on backwards and his unsteady walk by saying he slipped and injured himself when he got out of his car. He was supported in his claim of sobriety by several witnesses, one of whom spent the earlier afternoon with him at a local police station where Hall had gone to the witness's "aid" with regard to a speeding charge, and another who had spoken with Hall at the scene and met him for coffee afterward. On this charge the Board found that the evidence with reference to the manner in which Hall was conducted away from the scene of the accident, the docile manner in which he accepted his dismissal by an

officer inferior in rank, and his lack of explanation as to why he did not actively participate in helping the injured, together with affirmative proof of intoxication warranted the finding that he was guilty.

With respect to the second charge, one Joseph Schatchell testified that he is a State Trooper; that he was assigned to handle the desk, answer calls, and take care of people who came in. He received a call from the Harvey police that George Hall was causing a disturbance of some sort. He asked whoever called why they did not handle it themselves and was told in response that "it was in town and they said he works with you fellows and we felt it would be better for you to take care of it." He dispatched State police officers Adomaitis and Faragoi to look into the matter. Faragoi testified that he went to the Triple A Cab Company, which is owned by Mrs. Hall, wife of plaintiff. When he arrived at the scene, Mrs. Hall asked him to try to get George upstairs to go to bed "...and I did...I said, George, you better go upstairs because you had a couple of drinks and you would be better off to go to bed, and he said I will." Finally they brought him upstairs and he said he would go back to sleep. He admitted Hall was under "the influence," but he would not say he was drunk. It should be borne in mind that Hall was the witness's superior. The witness Adomaitis testified that he went to the scene with Faragoi; that they were called in by Mrs. Hall

because "Sergeant Hall was disturbing them by shooting a rifle in the back garage." The witness said Hall had a smell of liquor on his breath. From his observation of him, he would say he had a few drinks and was "under the influence." The witness was asked this question by one of the members of the Board: "Do you think you and the Harvey police handled the situation the way you would if it had of been Joe Doakes, or were you limited because it was Hall?" The witness replied: "It would be hard to say." Hall admitted that he had been drinking intoxicating liquor. His wife admitted that she had made the call to the police because she thought her husband was "stiff;" that he was "drunk."

Counsel for plaintiff place emphasis on the reluctance of the police officers to state outright that Hall was drunk, and on discrepancies in their evidence. The Board obviously considered this was due to the fact that they were testifying against a fellow and superior officer. With respect to the wife, she, too, qualified part of her story for obvious reasons. We have set forth enough of the evidence to show that there was far more than ample testimony to support the finding of the Board.

A reviewing court in a case of this character is required to determine from the entire record whether the findings are against the manifest weight of the evidence. Logan v. Civil Service Commission, 3 Ill. 2d 81, 86-7, 119 N.E.2d 754, 756 (1954); Harrison v. Civil Service Commission, 1 Ill. 2d 137, 145-7, 115 N.E.2d 521, 525 (1953); Oswald v.

Civil Service Commission, 406 Ill. 506, 511, 94 N.E.2d 311, 314 (1950); Drezner v. Civil Service Commission, 398 Ill. 219, 227, 75 N.E.2d 303, 307 (1947); Adamek v. Civil Service Commission, 17 Ill. App. 2d 11, 17, 149 N.E.2d 466, 469 (1958); Nolting v. Civil Service Commission, 7 Ill. App. 2d 147, 158, 129 N.E.2d 236, 242 (1955). To be against the manifest weight of the evidence requires that an opposite conclusion be clearly evident or, as it is sometimes stated, palpably erroneous. The mere fact that there are contradictions in the evidence would not justify the court in reaching a different conclusion than that of the trier of the fact. Bunton v. Illinois Central R.R., 15 Ill. App. 2d 311, 323-4, 146 N.E.2d 205, 210-11 (1957); Becherer v. Belleville-St. Louis Coach Co., 322 Ill. App. 37, 42, 53 N.E.2d 731, 733-4 (1944). The Board which was the trier of fact in the instant case observed the demeanor of the witnesses while on the stand and was best able to judge when they were telling the truth and when they were inclined to favor a superior, a spouse or a friend. Such matters are not for a reviewing court.

Discipline is vital in the police department, which constitutes a force of armed men organized to protect the inhabitants of the state. The officials primarily charged with the enforcement of this discipline are the Superintendent of the State Highway Police and the State Police Merit Board. Undoubtedly the Superintendent of Police thought hard and long and took the entire record of the plaintiff into

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account before filing these charges. The Board who heard the charges gave plaintiff a fair trial. No one can read the record and the opinion of the Board without being impressed by their impartiality and good judgment. Courts must move with great care before they set aside the acts of an executive department of the government under any circumstances, but especially in matters such as this.

The judgment of the Circuit court is reversed.

Judgment reversed.

Dempsey, P. J., and McCormick, J., concur.

Abstract only.

47791

LUPE MARQUES,

Plaintiff-Appellant,

v.

RITA NAVARRO,

Defendant-Appellee,

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

MR. JUSTICE BURMAN DELIVERED THE OPINION OF THE COURT.

The defendant filed a special and limited appearance in a Dram Shop Action and moved to quash the substituted personal service of summons and to vacate the default judgment entered against her on October 16, 1958, in the sum of Ten Thousand Dollars. The court considered the sworn affidavits attached to the motion, the counter affidavit of plaintiff and after hearing oral testimony entered an order on March 9, 1959, quashing the service of summons and vacating the judgment. Plaintiff appeals.

An alias summons was issued on April 19, 1956, with typed instruction to the Sheriff to serve the defendant, "Rita Navarro at 2006 South Ashland Avenue, first floor apartment, Chicago, Illinois. Phone Se 8-0856 (c/o Esperanza Alexander, daughter)." On April 20, 1956, the Sheriff's return certifies that the summons was served upon defendant, Rita Navarro by leaving a copy of same at her usual place of abode with Esperanza Alexander, her daughter, a person of defendant's family of the age of ten years or upwards. The certification further states

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that such person was informed of the contents of the writ and further that on April 20, 1956, the deputy mailed a copy of the writ to the defendant at the foregoing address.

Section 13.2 of the Practice Act, Ch. 110 Ill. Rev. Stat. 1955, with respect to service of process on individuals provides for service by:

***leaving a copy at his usual place of abode with some person of the family, of the age of 10 years or upwards, and informing that person of the contents thereof ***

The only question necessary for our determination is whether the Sheriff's return has been impeached by such clear and convincing evidence as to show the summons was not served on Rita Navarro. Pyle v. Groth, 15 Ill. App. 2d 361.

The defendant, Rita Navarro, in support of her motion filed her sworn affidavit in which she alleges that she first learned of the judgment herein on or about November 26, 1958, when her son, Joseph Navarro, informed her that the Chicago Land Clearance Commission had discovered the entry of the judgment; that she is the owner of the store and apartment building located at 738 South Halsted Street, Chicago, Illinois, and has been such owner for approximately twenty years; that in January, 1955, said building was badly damaged by a fire, and she had to abandon her apartment and from the date of the fire until on or about July 26, 1956, she lived continuously with her son, Joseph Navarro, at 3501 Madison Street, Bellwood, Illinois; that she never resided at 2006 South Ashland Avenue, and that her daughter,

Esperanza Alexander, had no authority to accept any summons on her behalf; that if any summons was served upon her daughter it was never called to her attention; that she and her daughter have not been on speaking terms for many years and they do not visit each other; and that she has never been served with summons nor has she received a copy by mail.

The affidavit of Joseph Navarro states that he resides at 3501 Madison Street, Bellwood, Illinois, and that he has resided continuously at that address for the past seven years with his wife and two children; that he is the son of Rita Navarro and for the period from January 21, 1955 to July 16, 1956, his mother resided with him and that at no time did his mother ever reside at 2006 South Ashland Avenue; that his mother is seventy-six years of age and depends on him to take care of her business affairs; that in November, 1958, his mother received a letter from the Chicago Land Clearance Commission concerning the purchase of her property at 738 South Halsted Street and then he was informed about the judgment and he immediately informed his mother. The affidavit of Millie Navarro, the wife of Joseph, and the affidavit of Janet, the granddaughter of defendant, substantiate the same facts set forth in the petition of Joseph Navarro.

The affidavit of Louis Alejandre states that he resides at 1735 North 21st Street, Melrose Park, Illinois, and is a truck driver; that he is the grandson of Rita Navarro and that to his personal knowledge his grandmother made her home with Joseph Navarro from January, 1955 to July, 1956; and that he visited with her frequently and that at no time did she live at 2006 South Ashland Avenue.

The affidavit of James Staley states that he resides at 620 Marshall Avenue, Bellwood, Illinois, and is a friend of Joseph Navarro and has visited him at 3501 Madison Street, Bellwood, Illinois, on an average of at least once a week for the past four or five years; that he is acquainted with Rita Navarro and knows of his own personal knowledge that Rita Navarro continuously lived with Joseph Navarro during the period from January, 1955, to July, 1956; that during that time he saw Rita Navarro upon every visit he made to the home of Joseph Navarro; and that to his personal knowledge she never resided at 2006 South Ashland Avenue from January, 1955 to July, 1956.

The counter affidavit filed on behalf of the plaintiff, alleges that on information and belief Ben Nigro, Deputy Sheriff, did, on April 20, 1956, serve an alias summons upon Rita Navarro by leaving a copy of the summons with Esperanza Alexander, her daughter, at 2006 South Ashland Avenue, Chicago, Illinois; that Ben Nigro, before leaving summons first determined that the defendant lived with her daughter, who was over ten years of age, at that address, and that on April 20, 1956, Ben Nigro mailed a copy of the summons to the same address.

The only testimony offered at the trial was that of Rita Navarro and the Deputy Sheriff, Ben Nigro. Rita Navarro testified substantially to the statements she made in her affidavit. Ben Nigro testified that he is a Deputy Sheriff and that his records show that he made a service of summons at 2006 South Ashland Avenue, Chicago, on April 20, 1956, in this case.

During the interview with Esperanza Alexander about her mother, "she said, or must have told us, that Rita was her mother." We asked her who lived there, otherwise we would not leave the summons there. It was Esperanza Alexander who told us that Rita Navarro resided at that address. Only then did we serve the summons upon the daughter and mailed a copy. On cross-examination, he said, "My testimony is based on what my record shows. I have no independent knowledge at the present time."

The plaintiff argues that the testimony of defendant and four affidavits is not sufficient to impeach a Sheriff's return showing a proper service of summons and cites Pyle v. Groth, 15 Ill. App. 2d 361. In that case there was personal service on defendant and the deputy sheriff who made the service testified as to the manner, time and place of service. He also cites Marnik v. Cusack, 317 Ill. 362. There the court said that the well established rule is that the return cannot be overcome by the uncorroborated testimony of the defendant. There too the record showed personal service.

The burden is on the defendant to impeach the Sheriff's return. Pyle v. Groth, 15 Ill. App. 2d 361.

In the instant case, the testimony of Nigro was of no assistance to the plaintiff at the trial to contradict or challenge the affidavits or testimony of the defendant. The plaintiff offered no contrary evidence. We conclude that the trial court properly quashed the service of summons and vacated the

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judgment because the affidavits and evidence established by clear and convincing proof, that the summons was served at a place that was not plaintiff's "usual place of abode", and was sufficient to impeach the return of the Sheriff. *Maher v. Segal*, 33 Ill. App. 138.

The ruling of the Superior Court was correct and the order is affirmed.

AFFIRMED.

MURPHY, P.J. AND KILEY, J. CONCUR.

ABSTRACT ONLY.

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CATHERINE D. NOBLE, d.b.a. PINE TAVERN,)	
)	
Appellant,)	
)	APPEAL FROM SUPERIOR
v.)	
)	COURT, COOK COUNTY.
ILLINOIS LIQUOR CONTROL COMMIS- SION OF THE STATE OF ILLINOIS)	
and F. B. CALLANEN, Local)	
Liquor Commissioner of the)	
Village of Northfield,)	
)	
Appellees.)	

MR. JUSTICE SCHWARTZ DELIVERED THE
OPINION OF THE COURT.

This is an appeal from an order of the Superior court, affirming the decision of the Illinois Liquor Control Commission which upheld the action of the Local Liquor Commissioner of the village of Northfield in refusing to renew a license to plaintiff to sell alcoholic liquor at retail. This is, therefore, the fourth hearing of this matter.

The grounds upon which the license was refused were:

1. That plaintiff was not a resident of the village of Northfield, as required by the ordinances of the village and by statute. (Ill. Rev. Stat. 1957, Ch. 43, Par. 119, 120, Sec. 11.)
2. That the number of licenses the village was authorized to issue had been reduced from five to four, effective April 25, 1958.

One Noble operated a tavern in the village of

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Northfield. In 1955 the chief of police suspected that Noble did not live in the village, but on investigation concluded, with mental reservations, that Noble resided on the tavern premises. Hence, Noble's license was renewed for the year 1956, and in that year he died. As the 1957 license period approached, the chief of police talked to Noble's widow, who lived in Winnetka. A meeting was arranged with the liquor Commissioner, and upon Mrs. Noble's assurance that she would become a resident of the village, the 1957 license was issued to her. However, she did not move, but maintained her residence in Winnetka. On three occasions - twice when the place was burglarized and once when a burglar alarm went off - Mrs. Noble could not be reached except at her place in Winnetka. At the end of 1957 when she applied for a new license, the chief of police refused to approve her application. Upon her protestation, he asked her to sign an affidavit of residence, which she refused to do.

On April 9, 1958, the village passed an ordinance effective April 25, 1958, reducing the number of licenses from five to four. Four licenses had been issued to existing licensees. Mrs. Noble's application which had been made prior to January 1, 1958 was rejected.

Mrs. Noble testified that she owned a house at 1114 Merrill Avenue, Winnetka. She rented the house to tenants in June 1958 and on the advice of her attorney, established a residence (so-called) in Northfield by

renting a room for about four weeks prior to receiving a letter from the Liquor Commissioner informing her that he could not issue a license to her. The testimony on behalf of Mrs. Noble is not as explicit or convincing as that of the Liquor Commissioner and the Chief of Police. It appears clear that Mrs. Noble was treated with patience and kindness in an effort to have her establish a bona fide residence in the village, and that she failed to comply.

Section 119, Chapter 43, Illinois Revised Statutes, 1957, provides that a license shall be purely a personal privilege; that it shall not constitute property; shall not be alienable or transferable; nor descend to heirs or legatees. Provision is made for a six-month period for liquidation after death, bankruptcy or insolvency. Any licensee may renew his license provided he is then qualified, but it is also provided that the renewal privilege shall not be construed as a vested right "which shall in any case prevent the village president or board of trustees from decreasing the number of licenses." The statute speaks for itself and is conclusive on this point.

The plaintiff states that the question of residence was totally ignored by the Illinois Liquor Commission in its order and findings. It is true they made no specific finding that plaintiff was not a resident of Northfield. The Commission did find that the action of the local Liquor Control Commission in refusing the application was proper. After the finding, an application for rehearing was made

charging among other things that the Commission had not made findings of fact. The Commission reconsidered the matter and entered an order stating that after having carefully considered the evidence, it sustained its previous order. The evidence before the Commission was principally concerned with the place of residence of plaintiff. Evidently the Commission felt that this question was amply covered by its finding that the denial of the application was proper.

Plaintiff's own testimony shows that she had not established a bona fide residence in the village, but was only seeking to effect some temporary compliance with the law. Plaintiff said:

"I rented a room on Ridgeland Avenue in Northfield about a half block from the tavern. I rented the room under advice of my attorney in 1958 to establish residence in Northfield. I rented the room for about 4 weeks, the entire 4 weeks being the period prior to receiving the letter on April 25 from the liquor Commissioner informing me that he could not issue me a license."

Even if plaintiff had established residence, a reduction in the number of licenses from five to four was an adequate basis for refusal of the Commissioner to renew plaintiff's license. Schreiber v. Illinois Liquor Control Commission, 12 Ill.2d 118; People v. McBride, 234 Ill. 146; People ex rel. Fitzgerald v. Harrison, 256 Ill. 102.

Defendants make the further point that even if plaintiff were entitled to a 1958 liquor license, the

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matter is now moot by reason of the fact that the license period in question has expired. We think this is sound, but inasmuch as we have decided the matter on the merits, it is not necessary for us to rule on that point.

Order affirmed.

McCormick, P. J., and Dempsey, J., concur.

Abstract only.

47741

ALICE D. JAMES,

Plaintiff - Appellant,

v.

DAVID JAMES,

Defendant - Appellee.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

Alice D. James and David James were married in 1940.

Two children were born of the marriage, Stewart, 17 years old a senior in high school, and David, 9 years old. On April 3, 1957, a decree was entered granting a divorce to the wife on the grounds of cruelty. The parties orally reached a property settlement that was subsequently written and incorporated in the divorce decree. By its terms the husband agreed to pay \$200 a month for the support of the two children, to pay plaintiff \$25,000 in full settlement and discharge of all claims against his person and property including alimony, and to pay her attorney's fees of \$2,500. With respect to the \$25,000 the agreement stated that \$5,000 would be paid when the divorce decree was entered and the balance on or before 120 days, provided she would quitclaim to him her joint tenant's interest in their residence property and vacate the premises. Pursuant to the agreement she was paid \$5,000 and her attorney \$2,500 on the day the decree was entered. Thereafter she tendered back the \$5,000 and within 30 days after the entry of the decree filed

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a motion to vacate, alleging that the property settlement had been procured through fraud and misrepresentation on the part of defendant relative to the true value of his net assets. The decree was modified by increasing the amount of child support from \$200 per month to \$75 per week for both children. In other respects the motion was denied, as was her motion for leave to file an amendment adding coercion as a further ground for vacating the decree. Defendant filed a petition seeking to compel plaintiff to deliver a quitclaim deed to the residence property in accordance with the decree and agreement. The court directed her to deliver a deed within 10 days. Plaintiff prosecuted an appeal from the decree of divorce, the order to vacate and the order requiring her to deliver a quitclaim deed. The Supreme Court took jurisdiction because the decree required her to convey her interest in a freehold. In an opinion filed June 20, 1958, (14 Ill. 2d 295), rehearing denied September 15, 1958, that court said (305): "With these principles in mind it is our opinion that the property settlement in this case must be set aside not only for its manifest inequity and unfairness, but also because its accomplishment does not clearly appear to have been entirely free from coercion and misrepresentation." The Supreme Court ordered that so much of the decree as relates to the property settlement be reversed and that the cause be remanded with directions to conduct such further proceedings with respect to child support and a settlement of property or alimony as equity and justice require, and that the order requiring the plaintiff to deliver a quitclaim deed be reversed.

After the filing of the mandate and hearings the chancellor on December 19, 1958, entered an order awarding the plaintiff permanent alimony of \$125 per month, child support of \$62.50 per month each and attorney's fees of \$3,000 for services in the preparation and trial of the petition to vacate the settlement agreement, for services on the prior appeal and for services in the trial court after the filing of the mandate, and ordered that plaintiff pay to defendant \$5,000 within 10 days. This was the amount received by her as part of the property settlement under the original decree. The order further found that defendant had paid to her from the date of the original decree, April 3, 1957, to and including December 3, 1958, the sum of \$6,642.93, an amount in excess of that which was fair and reasonable for the defendant to have paid and that sum should stand as full and complete discharge of any liability of the defendant for payment to plaintiff of permanent alimony and support and maintenance of the children to and including December 3, 1958. The order further found that the defendant had paid to plaintiff's former attorney \$3,000 (the agreement said \$2,500) in connection with the divorce proceeding and the property settlement agreement which had not been tendered or repaid to the defendant, that taking into consideration the \$3,000 theretofore paid by defendant he should pay an additional sum of \$3,000 to plaintiff for attorney's fees and costs, to be made periodically, and that any additional fees and costs incurred by plaintiff be her obligation. Plaintiff appeals from the order of December 19, 1958.

The business activities and income of the defendant are related in the Supreme Court opinion. There was a general decline in the automotive industry in 1957 and 1958 which resulted in a lessening of sales of automobile accessories, including defendant's business. Nearly all business enterprises have high and low periods. Plaintiff testified that during the years 1954, 1955 and 1956 her husband spent \$12,000 per year to maintain her and the children. The Supreme Court found that defendant's net worth at the end of 1956 was \$170,773. The estate of plaintiff consists of her one-half interest in the marital home of \$21,500; savings at a loan association of \$2,250; 90 shares of corporate stock of \$2,250; a 1953 automobile; household furniture; and a small bank balance. In determining the amount of alimony and child support it is the court's duty to consider the property and resources of the parties as well as their incomes. *Decker v. Decker*, 279 Ill. 300; *Olin v. Olin*, 347 Ill. App. 177; *Bramson v. Bramson*, 17 Ill. App. 2d 87. We recognize that the assets of the defendant have been reduced as a result of the unfortunate marital dispute. In determining an award of alimony the matters generally considered are the ages of the parties, health, property and income of the husband, the separate property and income of the wife, if any, the station in life of the parties as they have theretofore lived, whether or not there are any children dependent upon either for support, and the nature of the misconduct of the husband. *Byerly v. Byerly*, 363 Ill. 517.

A careful consideration of the record convinces us that the chancellor did not give effect to the spirit of the Supreme Court opinion. The defendant did not diminish his standard of living as a result of the drop in the sales of his corporation. In November, 1957, he remarried. He rented an apartment at a rental of \$190 per month and purchased therefor \$5,000 worth of new furniture. He purchased a new Cadillac in April, 1958. He expended \$11,000 for the purchase of a summer home in Wisconsin. In 1957 and 1958 he took whatever monies he needed by salary or loans for use in maintaining himself and continuing his station in life. Viewing all the factors and the Supreme Court opinion we find that the plaintiff should be awarded \$200 a month for alimony and \$100 a month for each child for support and maintenance, retroactive to April 3, 1957, when the decree for divorce was entered. Plaintiff should also have the exclusive use of the parties' house until the further order of the court. The defendant will also be required to pay all the taxes and insurance thereon. Plaintiff will be awarded the furniture and furnishings therein. The defendant should be required to pay for the medical and dental expenses of plaintiff and the children. Defendant will be given credit for the amounts paid by him for alimony and child support from April 3, 1957. The \$5,000 retained by the plaintiff will also be credited to the defendant.

Plaintiff maintains that the chancellor erred in not entering an order upon the defendant to provide Stewart with the funds required for a college education. A recent opinion by

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Mr. Justice Schwartz (Maitzen v. Maitzen, No. 47721, filed November 30, 1959) discusses the duty of a parent to provide his children with a college education. The court in affirming the order requiring the father to pay \$150 per month for the education of his daughter for a period of 4 years, said: "The public policy of this state, that a college education be given children whenever possible, is evidenced by the many institutions of higher education maintained by the state. * * * A divorced parent should not, however, expect his children to rely on the bounty of others when he has ample means to provide for them." At the time of the hearing the sales of the defendant's corporation had dropped. In the Maitzen case the father's annual income after taxes was \$28,000 and the net worth of his business was in excess of \$400,000. Under the factual situation presented by the record we do not feel that defendant should be required to pay for a college education for Stewart. Should defendant prosper plaintiff will have an opportunity to apply to the court for an order on the father to pay in part or in whole for a college education for Stewart and for David in due time. To the credit of defendant he states that he is willing to aid his boys in securing a college education should his financial circumstances permit.

ably We agree with the plaintiff that she should be reimbursed for litigation expenses incurred on her behalf since the entry of the erroneous decree of April 3, 1957, and for all costs

necessarily incurred by her in bringing about the reversal of that decree. Plaintiff urges that the chancellor erred in awarding \$3,000 to include all her costs and attorney's fees. She states that the results achieved and the time and labor expended by her attorney require an award of \$30,000 for attorney's fees. Plaintiff's counsel spent 692-1/2 hours in this cause through the appeal to the Supreme Court and 20 additional hours in trial before the chancellor up to November 7, 1958. There was testimony that the usual and customary minimum charge for services rendered by plaintiff's counsel was from \$30 to \$40 per hour. The defendant offered no contrary evidence on either the value of the services rendered or the time expended by plaintiff's attorney. We recognize that the valuable services rendered by counsel for plaintiff should be adequately rewarded. In deciding on the amount to be paid for attorney's fees due consideration must be given to the ability of the husband to pay. We are of the opinion that in the state of the record plaintiff should be awarded an additional \$3,000 as attorney's fees. This appeal cannot consider attorney's fees for services rendered subsequent to the filing of the notice of appeal.

We do not agree with plaintiff's assertion that the chancellor erred in refusing to award her a lump sum alimony award in gross in lieu of installment alimony payments. The plaintiff has not made out a case authorizing the court to award her a lump sum alimony in gross.

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For the reasons stated the order of December 19, 1958, is reversed and the cause is remanded with directions to enter an order awarding plaintiff alimony of \$200 per month and child support and maintenance for each child of \$100 per month, retro-active to April 3, 1957; that the defendant pay the medical and dental expenses reasonably required by plaintiff and the children; that he reimburse her for all costs and expenses in the litigation incurred by her since April 3, 1957; that he be required to pay the taxes and insurance on the residence property; that she and the children occupy these premises until the further order of the court; that she be awarded the furniture and furnishings therein; that she be awarded \$6,000 as attorney's fees, which includes the additional \$3,000 given in this opinion; and that he have the credits hereinbefore stated.

ORDER REVERSED AND CAUSE REMANDED
WITH DIRECTIONS.

BRYANT, P.J., and
FRIEND, J., Concur.

reasonably incurred

47796

SAMUEL A. FLINK, ASSIGNEE OF
EXPORT CONTAINER CORPORATION,
a corporation,

Appellee,

v.

REMINGTON RAND, INC., a corpo-
ration, Division of Sperry Rand
Corporation, a corporation,

Appellant.

APPEAL FROM THE CIRCUIT
COURT OF COOK COUNTY.

MR. PRESIDING JUSTICE DEMPSEY DELIVERED
THE OPINION OF THE COURT.

Samuel Flink, on September 25, 1958, filed a two-count complaint against Remington Rand Co. Count I alleged the breach of a February 1946 contract under which Remington was obligated to pay Flink \$2,000.00. Count II charged the defendant with fraud in inducing Flink, in August 1947, to relinquish a \$3,000.00 judgment he had, in return for its agreement to pay the \$2,000.00.

The United States Government, through its district attorney, represented Remington under a contract made with that company in May 1947, in which it had assumed Remington's obligation to Flink and had agreed to hold Remington harmless in the event any litigation arose. The Government moved to dismiss the complaint on the ground, inter alia, that the statute of limitations barred the action. The motion was denied. The defendant then answered, denying the breach and the fraud, and setting up, as an affirmative defense, the running of the limitations statute. The plaintiff

moved for summary judgment on count I; the defendant moved for summary judgment on counts I and II. The plaintiff's motion was granted. The defendant's motion was denied as to count I and granted as to count II. Both parties appeal.

In 1945 the Government had a contract with Remington for certain military supplies. One of Remington's subcontractors was the Export Container Corp. Export employed Flink as general manager. Flink's agreement with Export provided for a \$3,000.00 payment to him upon the expiration of the contract between Export and Remington. When this contract was terminated and Export did not pay, Flink sued for the \$3,000.00. In February 1956 Remington agreed to pay Export \$2,000.00 if Flink's claim was reduced to judgment. In December 1946 Flink obtained a judgment for \$3,000.00. In May 1947 the Government, in negotiating the settlement of the war contract, released Remington from any obligation to Export and assumed the obligation itself. In August 1947, pursuant to the procedure recommended by the Government, Export assigned to Flink the February 1946 agreement it had with Remington, and Flink, in turn, released his judgment against Export. The written understanding reached by Flink and Export specifically referred to the prior contract of May 1947 between Remington and the Government, wherein Remington's \$2,000.00 obligation to Export had been taken over by the Government.

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The complaint alleged that Flink had delayed the prosecution of his claim because of his reliance upon the

repeated promises of both Remington and the Government that the debt would be paid, and that he was not informed until 1958 that the Government did not recognize its validity.

In support of his motion for summary judgment the plaintiff produced correspondence between his attorneys and Remington, various departments of the Government and elected public officials. The plaintiff's position is that these letters are unequivocal admissions of indebtedness, that the admissions tolled the running of the statute of limitations, that the Government was acting as the agent of Remington and its acknowledgment is binding on Remington. He further takes the position that the doctrine of equitable estoppel should be invoked to prevent Remington from raising the limitations defense, because Remington instructed him to deal with the Government, and never told him that he could not rely upon receiving payment from the Government or that it had rejected his claim.

We believe the evidence does not substantiate these contentions. After Flink became the assignee of Export to its February 1946 agreement with Remington, his attorney and the defendant exchanged several letters concerning the status of his claim. Throughout this correspondence Remington made it clear that the Government had taken over its obligation to Export and that Flink would have to look to the Government for payment. Remington tried to assist him by writing to the Government and by advising him of the procedure to be followed in obtaining payment from the Government. It expressed its

sympathy at the delay Flink was encountering, but it never renewed its promise to pay.

An express promise is not necessary to toll the running of the statute of limitations; a promise may be implied from an unqualified admission that the debt is due and unpaid, if accompanied by nothing said or done which rebuts the presumption of a promise to pay. Edwards v. Harper, 234 Ill. App. 296; Coulson v. Hartz, 47 Ill. App. 20. But Remington's conduct completely negated any implication of payment. Its letter of July 22, 1947, said: "...I discussed the matter of the Samuel Flink claim with the Government, and they advised me that in view of the assignment from Remington Rand, Inc. to the United States Government, that all negotiations incident to the payment of the claim must be conducted direct with that office." Its letter of February 19, 1948, said: "It is indeed regrettable that this claim has not been settled but we have been advised, on more than one occasion, that any settlement of the claim is entirely out of our hands through assumption by the Government."

Furthermore, the evidence does not show that the Government was the agent of Remington, but even if it did, the plaintiff would not be benefited, for the exhibits reveal neither a new promise nor any intimation by the Government that it would pay. The letters from various Government officials merely stated that Flink's claim was being investigated. These statements imposed no new obligation on

the Government. They differ entirely in purport from the declaration, in the case upon which the plaintiff relies, "I will send you some money just as soon as I possibly can," which has been construed, although there is much contrary authority, as a promise which delayed the operation of the statute until such time thereafter, as would be reasonable for the keeping of the renewed promise. Hurt v. Steven, 333 Ill. App. 181.

Moreover, we do not believe that the doctrine of equitable estoppel can be invoked. The elements of the estoppel doctrine were discussed in Beasley v. American Surety Co., 243 Ill. 447. The court stated:

"The essential elements of an estoppel in pais are: Misrepresentation or concealment of material facts, ignorance of the truth of the matter by the party to whom the representations were made, and reliance on his part in acting upon the representations. Holcomb v. Boynton, 151 Ill. 294. A party desiring to claim the benefit of an estoppel cannot shut his eyes to obvious facts or neglect information easily obtainable, and then charge his ignorance to others. Vail v. Northwestern Mut. Life Ins. Co., 192 Ill. 567. The party to whom the representations were made must have been without knowledge or the means of knowledge of the real facts. 21 C. J. 1119. One relying on estoppel must have exercised such reasonable diligence as the circumstances of the case require. If he conducts himself with a careless indifference to means of information reasonably at hand or ignores highly suspicious circumstances which would warn him of danger or loss, he cannot invoke the doctrine of estoppel. 21 C. J. 1129-1130."

There is no evidence that Remington concealed or misrepresented material facts. On the other hand, there is evidence that Flink had full knowledge of the real facts and knew exactly what was taking place between Remington and the

Government. For example, Flink knew, at the time he released his judgment against Export in August of 1947, that Remington's obligation to Export and to him had been assumed by the Government. Again, if it were conceded, arguendo, that the Government was Remington's agent, a different conclusion would not follow. There is no evidence of misrepresentation on the part of the Government. Flink was informed that the Army and the Department of Justice were investigating the termination contract of Export and his claim. According to the exhibits, the last letter from the Government was received in 1952. The plaintiff had ample opportunity thereafter to start his suit before the bar of the statute fell; he was not enticed into inaction by anything the Government did.

In count II Flink complained that fraudulent misrepresentations were knowingly made by Remington and by Export which induced him, in August 1947, to release his \$3,000.00 judgment in return for Remington's promise to pay him \$2,000.00; that in furtherance of its fraudulent scheme, Remington led him to believe that the United States Government would meet the obligation; that he did not discover the false character of the representations until July 1958, and therefore, he contends, he is not stopped by the limitations statute.

There is nothing in the record substantiating the plaintiff's assertions of fraudulent conduct. Although he had a legal action against Remington, he chose not to pursue it. Instead he looked to his Government for payment and

placed his reliance upon its keeping its contract. It appears too as if Remington had no knowledge the Government would not make good its obligation. The plaintiff was an unfortunate victim of procrastination, unkept commitments and governmental red tape, but we cannot say he was the victim of fraud.

The contract sued on in count I was executed in 1946; the alleged misrepresentations, which form the base for count II, were supposed to have taken place in 1947; the present suit was instituted in 1958. The running of the statute of limitations was not tolled by either express or implied promises which renewed the indebtedness; the defendant is not estopped from raising the defense of the statute. Count I and count II are barred by the statute. Sections 16 and 17, ch. 83, Ill. Rev. Stat. 1959.

We conclude that the plaintiff's motion for summary judgment on count I should have been denied and the defendant's motion should have been granted. We affirm the order of the Circuit Court in reference to count II. Inasmuch as our decision disposes of all the issues which would be before the Circuit Court, there is no need of remanding the case just for the purpose of entering judgment upon count I. Accordingly, judgment for the defendant upon count I will be entered here. Ill. Rev. Stat. 1959, ch. 110, §92(1)(e).

Judgment as to count I reversed;
Judgment as to count II affirmed.

Schwartz and McCormick, JJ.,

Abstract only.

STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT

General No. 10250

Agenda No. 9

John McCann, John Carmichael, John
Fisher, Paul McMullen, and Elgin
Dilbeck,

Plaintiffs-Appellants,

vs.

W. C. Gill and Peter Girardi, as
Trustees of Welfare and Retirement
Fund of Progressive Mine Workers
of America, District No. 1, and Ray
Dupee, Dominic Molnar, Lester
Boetta, Jack Duncan, W. C. Gill,
Paul Halberslaven, Louis Lunaghi,
and Clarence Beck, as Members of
the Joint State Executive Board of
the Progressive Mine Workers of
America, District No. 1, a Labor
Union, and Coal Producers Association
of Illinois, a voluntary association of
coal operators,

Defendants-Appellees.

Appeal from the
Circuit Court of
Jangamon County

REYNOLDS, P.J.

This is a suit by five retired coal miners, members of the
Progressive Mine Workers of America, District 1, a labor union,
against W. C. Gill and Peter Girardi, as Trustees of the Welfare

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and Retirement Fund of the Progressive Mine Workers of America, District No. 1, and the members of the Joint State Executive Board of Progressive Mine Workers of America, District 1, a labor union, and Coal Producers Association of Illinois, a voluntary association of coal operators, brought in the Circuit Court of Sangamon County, Illinois, asking that Plan No. 7, as amended, of the defendant Trustees of the Welfare and Retirement Fund, as approved by the Joint State Executive Board of the union and the coal operators, be held void and invalid; that the court order the defendants to administer the Welfare and Retirement Fund in accordance with the terms of the plan in effect immediately prior to the adoption and approval of Plan No. 7, and restore the plaintiffs and all persons similarly situated to the retirement pension rolls of the Welfare and Retirement Fund; that the court determine the amount of pension benefits due the plaintiffs and others similarly situated, which remain unpaid by reason of the said Plan No. 7, and enter judgment in that amount for the plaintiffs; that the defendants be enjoined from paying any money from said Welfare and Retirement Fund to any person under the provision and terms of Plan No. 7, and in particular two mines named in the complaint; and for a mandatory injunction for an accounting of all funds received into and disbursed from the Welfare and Retirement

Fund since February 1, 1955. The plaintiffs afterwards amended their complaint, in part, deleting in one place the allegations that made it a class complaint, and correcting other paragraphs. The defendants moved to dismiss the complaint, as amended, and the court allowed the motion to dismiss. The plaintiffs elected to stand on their complaint, as amended, and the matter comes to this court on appeal.

In order to understand the questions involved, it is necessary to set out the status of the plaintiffs, the plans adopted for the administration of the welfare and retirement fund, and other relevant matters.

John McCann retired on February 14, 1949. The last mine he worked in was Superior Mine No. 3, and at the time of the institution of the suit, he was a member in good standing of the union. Since his retirement, he has been paid as pension or retirement pay, the sum of \$6177.46.

John Carmichael retired November 1, 1950. The last mine he worked in was Panther Creek Mine No. 5, and at the time of the institution of the suit, he was a member in good standing of the union. Since his retirement he has been paid as pension or retirement pay, the sum of \$5427.46.

John Fisher retired December 3, 1955. He last worked at Superior

Mine No. 4. He was a member in good standing of the union, but it does not appear whether he is now a member. Apparently, due to the institution of Plan No. 7, he has not received any pension payments.

Paul McMullen retired August 30, 1949. The last mine he worked in was Farrand Coal Company mine, and at the time of the institution of the suit was a member in good standing of the union. Since his retirement he has been paid as pension or retirement pay, the sum of \$6827.46.

Elgin Dilback retired April 27, 1955. He last worked at Bluebird Mine No. 7. He was a member in good standing of the union. Apparently, due to the institution of Plan No. 7, he has not received any retirement pay, but has received from the welfare assistance fund the sum of \$950.00 and his proportionate share under Plan No. 7, for the distribution of money contributed to the welfare fund by the Bluebird mine, in the amount of \$88.98. On December 30, 1957, Mr. Dilback, in writing, approved the revised pension plan as set out in Plan No. 7, as amended.

The original Welfare and Retirement Fund was created by agreement between the union and the operators on June 12, 1946, on the basis that the operators were to pay into the fund five cents for each ton of coal mined. There were to be two trustees, one representing the

the miners and one representing the operators. At the same time, a Joint State Executive Board was set up, to be composed of miners and coal operators. The trustees were to formulate plans for the distribution of the fund and those plans were to be approved by the Joint State Executive Board. The original purpose was to pay miners for sickness, permanent disability, life insurance, death, hospitalization of miners and their dependents, and for other related welfare purposes, as determined by the trustees and approved by the Joint State Executive Board. The trustees entered into a trust agreement for the receiving, holding and disbursement of said funds. Later, in 1947, pensions were included in the purpose of the fund, retroactive to June 1, 1946.

In accordance with the agreement between the union and the operators of June 12, 1946, on July 25, 1946, a trust agreement was entered into by the union, the operators, and the two trustees, for the administration of the fund. It was provided that the welfare and retirement fund should be held by the trustees and should be applied by them by a plan to be approved by the scale committee of the union and by the Joint State Executive Board of the Association and the Union for the purposes set forth in said agreement of June 12, 1946. It was further provided that the rights of the employees for whose benefit payments were made

in said welfare and retirement fund in or to said fund and in or to any benefit therefrom should be determined solely in accordance with plan or plans to be adopted and approved for the administration of said fund.

The original agreement between the union and the operators, dated June 12, 1946, is not in the record, except for quoted portions. This original agreement, in part, after providing for the payments into the fund, the creation of the office of the co-trustees and the Joint State Executive Board, the creation of the trust fund, the setting out of the purposes for which money could be paid out of the fund, provided that "subject to the stated purpose of the fund and approval of the Joint State Executive Board, the trustees should have full authority with respect to the question of coverage and eligibility, priorities among classes of benefits, amounts of benefits, methods of providing or arranging for provisions of benefits and all related matters."

The various plans adopted by the trustees and approved by the Joint State Executive Board for the administration and disbursement of the fund are not in the record. However, it does appear from some of the exhibits offered that with changing economic conditions, the closing of certain mines and other factors, that the trustees from time to time submitted revised plans for the administration of the

trust fund. In 1951, a Plan No. 5 was adopted. Plan No. 5 recognized that in many instances an operator of a mine might pay into the fund for only a short period of time, so that such payments would be grossly inadequate for the benefits which might be claimed to have accrued to the employees of such mine. In such event, the trustees, with the approval of the Joint State Executive Board, were given authority to determine the eligibility of the employees of such mine with regard to the sharing in such fund and might disqualify or limit such employees as the facts and circumstances might warrant, provided, such action as taken by the trustees should be applicable to the employees of other mines under similar and like circumstances and conditions.

Here, the union and the operators apparently abandoned in part, the "common pot" purpose of the fund, and adopted in part, the "mine to mine" theory. The plaintiffs contend that this switch or change was contrary to the spirit, intent and purpose of the fund as originally established. However, by the terms of the original agreement, the trustees, with the approval of the Joint State Executive Board, were authorized and empowered to determine the rights of the employees for whose benefit payments were made into the fund.

Then in 1955, the controversial Plan No. 7 was adopted. This

plan set up a definite "mine to mine" basis for administration of the fund, with contributions from each mine, to be placed to the credit of that particular mine and to be used for pensions and benefits of that mine. The plan also provided that certain money then on hand, approximately \$3,000,000.00 was to be transferred to the Welfare Assistance Fund, to be paid out to member-employees and their dependents who were then on the rolls from abandoned or defaulted mines. Plan No. 7 continued the provisions of Plans No. 5 and No. 6, as to stopping of benefits to employees of those mines where contributions were less than pension and benefits paid.

Under the program set up by Plan No. 7, the \$3,000,000.00 transferred to this fund was paid out to miners who had worked in mines that had been abandoned or had failed to pay into the fund. On March 1, 1957, this Welfare Assistance Fund had been exhausted. It appears that when the original program was instituted in June 1946, there were seventy-one mines contributing to the fund. On February 1, 1955, this number had decreased to twenty-five. At the time of the hearing by the Circuit Court of Sangamon County, only eleven mines were contributing to the fund. It further appears that the abandoned and defaulted mines, at the time the Welfare Assistance Fund was exhausted, had contributed \$9,146,493.28 to the fund, and there had been paid

out in benefits and pensions to the employees of these mines, the sum of \$15,149,044.85. It is well established by these facts and figures, that the "common pot" conception, if that was the original conception of the fund, was actuarially unsound and impossible of continuation, and it appears that as time went on, the trustees, the coal operators and the miners working, became aware that the "common pot" theory was unsound and took steps by the plans from time to time to meet the changing conditions. In meeting the changing conditions, the "common pot" theory was abandoned and the "mine to mine" theory was adopted. The "common pot" theory was unsound for the simple reason that no organization, fund or trust can continue to pay out more money than they receive. The "mine to mine" theory is economically and actuarially sound and provides that those miners who work and produce coal that makes up the fund, benefit in pensions and benefits according to the contribution of the particular mine at which they work.

This case presents varied and complex issues. The various plans for the administration of the welfare and pension fund are, because of the many matters involved, long and detailed. The pleadings with their exhibits, are bulky and voluminous. Justice would not permit this court to enter into any lengthy discussion of the various points at issue and we do not consider that necessary. We agree with the

statement of plaintiffs, in their reply brief where they state that the basic issues are two in number. The first question is whether the trustees, with the approval of the Joint State Executive Committee, in adopting Plan No. 7, acted within the scope of their authority, and the second question is whether the plaintiffs are proper parties to this suit. If the trustees acted outside the authority vested in them, then of course, Plan No. 7 and its provisions are null and void. On the other hand, if they were authorized and empowered by the original contract and trust agreements entered into, and by subsequent contracts and trust agreements entered into, to adopt Plan No. 7, then the complaint of the plaintiffs must fail.

There can be no question that the trustees of any trust, are bound by the stated purposes and directions contained in the trust. McGookey v. Winter, 381 Ill. 516; Harris Trust & Savings Bank v. Wanner, 393 Ill. 598; Sheets v. Security First Mortgage Co., 293 Ill. App. 222. However, a trust may include "express powers" which appear from the language of the trust instrument itself and "implied powers" which are inherent in the purposes and intent of the trust created and the objects to be attained thereby. Barrett v. Hennebry, 322 Ill. App. 703.

It must be remembered that this is not a dead trust, with specific instructions for its enforcement, by a will or otherwise. This trust,

created by the miner's union and the coal operators, is a living, continuing, active trust. It was created for a worthy cause, and while perhaps created hastily and without proper and due consideration of all the matters involved at the time or that might arise in the future, its purposes are clearly stated and are definite. The fund was created by an agreement of June 12, 1946, by the miner's union and the coal operators, to be used in accordance with a plan to provide for using the fund for making payment to employees of the operator members of the coal producers, who are members of the miner's union, with respect to sickness, permanent disability, life insurance, death, hospitalization for members and their dependents, and other related purposes as determined by the trustees and approved by the Joint State Executive Board. In accordance with the original agreement of June 12, 1946, on July 25, 1946, the trustees, the miner's union and the coal operators entered into the first trust agreement for the holding, operation and disbursement of the fund, in accordance with a plan approved by the scale committee of the union and by the Joint State Executive Board, for the purposes set forth in the agreement of June 12, 1946. The rights of the employees for whose benefit payments were made in said welfare and retirement fund in or to said fund and in or to any benefit therefrom were to be

determined solely in accordance with the plan or plans to be adopted and approved for the administration of said fund. Reading of the purposes as set out in the agreement between the union and the operators dated June 12, 1946, shows that there were no pension benefits mentioned in the agreement, and none were mentioned in the first trust agreement. But in 1947, pensions for retired miners were included in the purposes of the trust, and while this was a deviation from the original agreement and trust, it was approved by the trustees and the Joint State Executive Board. Each contract executed between the union and the operators contained a provision that any plan for the distribution of monies of the fund must be approved by the trustees and the Joint State Executive Board, and all plans were so approved. The tonnage payments by the operators were increased from time to time to meet changing conditions. But the first radical change came in 1951, when Plan No. 5 was approved. Here, for the first time the "common pot" basis of payment was modified, and the "mine to mine" basis was at least recognized. The agreement between the union and operators, effective October 1, 1952, aside by the changes in Plan No. 5, also recognized and set forth that the fund created was an irrevocable trust and title to monies in the trust should be vested in and remain exclusively in the trustees of the fund. The agreement

further stated that the money to be paid in to the fund should not constitute or be deemed wages due to the individual mine worker. But the agreement, still clung, insofar as to those mines that were working, to the "common pot" theory, although it did set up provisions for those mines who had paid into the fund for only a short period of time, so that the payments made by such mine would be grossly inadequate for the benefits that might be claimed to accrue to the miners at that mine, and as to such mines, it was provided that the trustees, subject to the approval of the Joint State Executive Board, could determine the eligibility of the employees of such mine with regard to sharing in the fund, and might limit or disqualify such employees as the facts and circumstances warrant, provided such action as taken by the trustees should be applicable to the employees of other mines under similar and like circumstances. In this connection, Plan No. 5 set up the Welfare Assistance Fund to pay pensions and benefits to retired employees of defaulted or abandoned mines.

Plan No. 6 seems to be merely amendatory to Plan No. 5, except that it provided for a two year limitation for filing of any action at law or equity against the trustees, and cut off any benefits to workers at mines where contributions to the fund had been less than \$10,000.00. Both Plan No. 5 and Plan No. 6 provided that the trustees had the power to stop all benefits at mines where the pensions and

benefits paid to employees and dependents of those mines greatly exceeded contributions of those mines to the fund. While apparently seeking a solution to the problem of finding enough money to pay the pensions and benefits due under the terms of the trust, Plans No. 5 and No. 6 still cling to the "common pot" theory in part, but set up the machinery for the discontinuance or limiting of pensions and benefits to employees of those mines who had paid in less than \$10,000.00, those mines whose contributions were greatly exceeded by the pensions and benefits paid out to their employees, and those mines that had defaulted in payment, or had been abandoned. But the trustees had not yet adopted the complete "mine to mine" theory.

Plan No. 7, did completely adopt the "mine to mine" theory. It went further. There was about \$3,000,000.00 in the fund, and this money was transferred to the welfare assistance fund, to be paid out to member-employees and their dependents who were taken on the rolls from abandoned and defaulted mines. The mine is still operating, and contributing to the fund, under this Plan No. 7, in reality started from scratch and began building up a pension and retirement fund, on a "mine to mine" basis for their employees and those already retired. And the \$3,000,000.00 was expended in paying benefits and pensions to the employees and dependents of abandoned and defaulted mines, and on

March 1, 1957, this fund was exhausted. In expending this welfare assistance fund it was inevitable that some inequities and some hardships occurred. Yet, if the plan was followed as to all mines that had been abandoned or had defaulted, so that the action followed was applicable to all other mines under similar and like circumstances, that would be sufficient. It would be almost an impossibility to lay down rules and regulations for each mine and even if separate rules were adopted for each such abandoned or defaulted mine, it is likely that inequities and hardships would occur.

There are not too many authorities that might be cited in support of either the plaintiff's or the defendant's position in this case, for the reason, that while there are many cases on trusts, each of them is predicated upon certain facts, which in the main, are particular to that trust, and are not applicable to another trust. It thus becomes a matter of reasoning, based upon the facts in this particular case. The question still remains, did the trustees have the power, upon approval by the Joint State Executive Board, to adopt Plan no. 7. We think they did. In reaching this conclusion, we are mindful of the language of the original agreement between the union and the operators for the creation of a trust, where, after defining the purposes of the trust fund, the setting up of the trustee arrangement and the Joint

State Executive Order, it was provided that "the rights of the employees for whose benefit payments are made for health and retirement fund in or to said fund as in or to any benefit therefrom shall be determined solely in accordance with the plan or plans to be adopted and approved for the administration of said fund." While the express powers were there, in the beginning of the purpose for which the fund was to be created and used, there were also implied powers created for the determination of how and how much, and to whom, the benefits were paid. These implied powers were to be exercised by means of plans to be adopted and approved for the administration of the fund. The coal operators made no claim to the fund, and later in one of the plans declared the trust to be an irrevocable one and relinquished any claim to it. The union contributed no money to the fund and consequently had no vested right to it. The employees made no contribution to the fund, and by the language of Article 5, it was set out that the money paid into the fund was not constitutive or be deemed a part of the individual worker. It was simply a trust, paid for by the coal operators on the basis of the terms defined, to be distributed by the trustees, in accordance with plans to be adopted and approved. It was created by a contract between the union and the coal operators, which contract is to meet changing conditions, was renewed from year to year. The original

concept was unsound from a dollar and cents standpoint. The trustees could only disburse the money they received. They could not disburse money they did not have. If the seventy-one mines originally a party to the contract, had remained in business and put into the fund, the problem posed by this case would not have arisen. But, the number of operating mines, represented by the union, continued to dwindle. At the time of the trial of this cause, only eleven out of seventy-one were still operating and under contract with the union. Simple arithmetic determines that these eleven operating mines cannot pay the pensions and benefits for some seventy-one mines in 1916. The trustees from time to time adopted plans to meet this change, but up to Plan No. 7, none of them were effective. They found themselves in the position of having paid out \$15,000,000.00 to mines that had discontinued or defaulted, and having received from those mines only \$3,000,000.00. And in 1955, meeting their problem head on, the trustees adopted Plan No. 7, which provided for a "mine to mine" basis as to those mines still operating, and the distribution of the fund on hand, namely \$6,000,000.00 to the members-employees of those mines that had not defaulted or had defaulted, under the Welfare Assistance Program. In the distribution of the \$3,000,000.00 under the Welfare Assistance Program there must, of necessity, be some inequities. And this suit, and the administration

of the Welfare Assistance Program must be treated and considered as a class action. It is an impossibility to treat the case of each miner, employed, unemployed or retired, as a separate matter. And where, considering the matter in the light of a class action, the employees of mines abandoned or defaulted, were paid all and more of the money contributed to the fund by the abandoned and defaulted mines, they had received all to which they were entitled. These plaintiffs and all of their class were no longer in the cestui qui trust class because there was no money left in the trust, to which they were entitled.

There is no charge of dishonesty, or fraud on the part of the trustees. The plaintiffs can only complain about a question of policy in administering a fund. And since they have no longer any interest in the fund, they have no standing as individuals, or as a class. The plans were changed from time to time. The plaintiffs and all members of their class, were members of the union. The union negotiated the contracts with the coal operators. Under the union rules and regulations as to delegates and representation they must be considered as having participated and acquiesced in the various changes made in the contracts and the plans of the trustees. Three of the plaintiffs received payments under these plans for several years, and their pensions averaged around

\$6,000.00 each. Elgin Dilbeck gave his written consent to the provisions of Plan No. 7. The other plaintiff, John Fisher retired after Plan No. 7 was adopted and approved, and presumably only received the amount due him under the provisions of Plan No. 7 as it applied to the Welfare Assistance Program. Further, Plan No. 7 was tested by miners of the class of the plaintiffs by an umpire appointed by the District Court of the United States for the Southern District of Illinois, Southern Division, in accordance with the provisions of Section 302 (c) of the Labor-Management Relations Act of 1947, and that umpire held that current contributions to the Welfare and Retirement Fund of the Progressive Mine Workers of America, District No. 1, are made to provide benefits to the employees and their beneficiaries of mines of contributing operators and should not, as a matter of equity, and cannot, under the terms of the employment contract of 1937, be used to provide pensions for former employees of abandoned mines. This would seem to estop the plaintiffs from raising the question of the validity of Plan No. 7.

The language of the trial judge in his memorandum of opinion is apt here. The trial judge said: "It would be ironic to hold, however, that these contracting parties created a Frankenstein which they could not later by contract alter, amend or change."

The original concept and creating of the fund was unbound in

equity, economically and actuarially. Under the authority of the original contract it was changed to a "mine to mine" basis, and the money on hand was used to pay all and none of the money contributed to the fund by abandoned and defaulted mines to the employees of those mines.

We must therefore hold, that the trustees had the right to change the plans for administration of the fund, from time to time, as changing conditions required, and to adopt Plan No. 7. We must also consider this suit as a class action by the five plaintiffs, and hold that by participating in the distribution of the fund under various plans, and in view of the decision of the impartial umpire, that they and all of their class are estopped from raising questions as to the distribution of money in which they no longer have any interest.

Judgment affirmed.

CARROLL and ROETH, JJ., concur.

STATE OF ILLINOIS
APPELLATE COURT
TRIED DISTRICT

General No. 10254

Agenda No. 12

Gladys McKinney, as Administrator
of the Estate of Lester W.
McKinney, Deceased,

Plaintiff-Appellant,

vs.

Edward Burtle Evans,

Defendant-Appellee.

III
appeal from the
Circuit Court of
Clark County.

REYNOLDS, P. J.

Plaintiff, as administrator of the Estate of Lester W. McKinney, Deceased, brought suit against Edward Burtle Evans, for the wrongful death of her husband. McKinney was a farmer and livestock grower and Evans was a trucker for hire. McKinney had made arrangements with Evans to pick up certain livestock at his barn and haul them to market. On the day of the fatal injury to McKinney, it was raining and windy. Evans called McKinney about the stock and McKinney told him he wanted the stock to go; that the barnlot was muddy but he thought Evans

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could make it. Evans backed his truck into the barnlot and toward a door situated at the northeast corner of the barn. The door opened to the south. According to the testimony of Evans he had loaded stock at this door several times. Evans backed the truck with McKinney guiding him with his hand. Before reaching the proper place to stop the truck it became stuck in the mud, some 12 to 15 feet from the barn. Evans then drove the truck forward and told McKinney to watch, that he would have "to come pretty hard." He raced his truck motor backing up to get through the mud. As he backed up he could see McKinney's hand until the truck wheels hit the place where in Evans' language "it was digging." Again using Evans' words, "as soon as it powed the mud down and caught, I whirled to get my feet on the clutch and on the brake and I couldn't see him any longer because I was looking forward. When I felt the truck touch the barn I stopped and when I stopped I released the clutch just enough that it rolled a little and I stepped out of the truck."

Betty Jane Stark, a shorthand reporter, testified as to statements made by the defendant Evans to an attorney for the plaintiff, some two months after the fatal accident. This witness did not testify from notes taken but from her own independent recollection as to what was said by Evans in her presence. According

to this witness Evans said that he had backed his truck up to approximately 15 feet of the barn and became stuck in the mud. He pulled forward with the intention of backing up again. There was gravel out from the barn for a distance of approximately 10 feet and he backed up the second time in the same ruts he had made the first time, steering with his right hand and holding the door open with his left hand, leaning out of the truck and looking back. Reaching this ridge of mud that had built up when he became stuck the first time, the truck hesitated and then went over this ridge onto the gravel and then took hold. He went back pretty fast because he had backed all the way with the truck wide open to get through the mud and the next thing he knew he hit the barn..

The evidence about the gravel extending from the barn for some ten feet is not too clear. It does not appear whether the gravel was visible or covered with mud. It would seem that the place where the truck stuck the first time was some two to five feet from the edge of the gravel. From the evidence that Evans had loaded stock at this particular place several times, it would seem that both he and the decedent knew about the gravel. It is evident from both Evans' testimony and that of Betty Jane Stark, that Evans was racing his motor and that when the rear wheels of

the truck cleared the mud hump that had stopped the truck before, it gained momentum and moved backward until it hit the barn. According to Evans the truck "caught". According to Betty Jane Stark, Evans said the truck "hesitated and then went over the ridge onto the gravel and then took hold".

The truck pinned McKinney against the barn door injuring him so severely that he died within a short time.

The evidence shows that the truck had other animals in it that had been loaded prior to going to the McKinney farm. Evans testified he could not see out of the rear glass of the truck cab, or in the rear vision mirror because of the stock already in the truck, and that he was depending upon McKinney to call when he was close enough.

There were no eyewitnesses to the tragedy, and the testimony of Evans would not have been admissible under ordinary circumstances, but the plaintiff put in evidence the testimony of the witness Betty Jane Stark as to what Evans stated to the attorney for the plaintiff, and he was then allowed to testify what he said in her presence. Her testimony of what Evans said to the attorney, in her presence, and his testimony as to what he said at the time, furnishes the only evidence as to what happened.

The cause was submitted to a jury and the jury returned a

verdict of "Not Guilty". The post-trial motion of the plaintiff was denied and judgment entered for the defendant. Plaintiff appeals to this court. No questions are raised on the pleadings, and although the plaintiff claimed that the trial court gave four instructions which the plaintiff claimed were erroneous, and refused one instruction tendered by the plaintiff, the whole appeal hinges upon the giving of Defendant's Instruction No. 10, the plaintiff stating in her brief that this court, in the case of Allied Mills, Inc. v. Miller, 9 Ill. App. 2d 87, has already ruled that the giving of Defendant's Instruction No. 10 was reversible error under facts of striking similarity. Plaintiff then goes on to say that plaintiff therefore relies only upon the error of the trial court in giving Defendant's Instruction No. 10 to reverse the judgment of the trial court.

In support of plaintiff's position three cases are cited in the plaintiff's brief, namely Allied Mills, Inc. v. Miller, 9 Ill. App. 2d 87, 91; Williams v. Matlin, 328 Ill. App. 645, 649; and Crutchfield v. Meyer, 414 Ill. 210, 213. After filing of briefs upon consent of this court, plaintiff cited the case of Larry Lee Wolpert v. John Vernon Heidbreder, 21 Ill. App. 2d 486.

The instruction complained of, Defendant's Instruction No. 10, commonly called an "accident" instruction, was in the following words:-

"If you find from the evidence and under the instructions of the Court that Lester McKinney was injured as a result of an accident which occurred without the fault of the defendant, then the plaintiff cannot recover from the defendant."

In the Allied Mills, Inc. v. Miller case, defendant in that case offered and the trial court gave Defendant's Instruction No. 17, which is practically identical with Defendant's Instruction No. 10 in this case. The facts in the Allied Mills, Inc. v. Miller case were as follows:- Francis Hanauer, an employee of the plaintiff, Allied Mills, Inc. was struck and injured by a truck driven by Julius Collebrusco, an employee of Harry Miller. Collebrusco was engaged in trucking soybeans from two of the Allied Mills, Inc. plants in Taylorville, Illinois, on the morning in question. On one trip he brought Hanauer a wrench at Hanauer's request. Hanauer took the wrench and walking in the direction that Collebrusco's truck was headed, proceeded a short distance ahead of the truck and then disappeared to the right around the circular end of a cement building used for the storage of grain. Collebrusco started his truck and followed a route substantially the same as that taken by Hanauer. As Collebrusco rounded the circular end of the building it was necessary for him to make a sharp, right turn and to drive

his truck with a box eight feet wide across a platform only eleven feet six inches in width, which was immediately adjacent to the storage bin. As Collebrusco started his right turn, he saw Hanauer in front of him but looked away in order to negotiate the narrow passage. As he drove across the platform his truck struck Hanauer crushing him against the building and injuring him severely. Hanauer brought proceedings under the "Workmen's Compensation Act" and received a substantial award. The Allied Mills, Inc. then brought suit to recover from the defendant Harry Miller, Collebrusco's employer, the amount of the award and further damages. The cause was tried before a jury which returned a verdict for the defendant. On appeal the plaintiff complained of Defendant's Instruction No. 17 and the court reversed the judgment of the lower court, holding that Hanauer's injuries were caused either by the negligence of Collebrusco, or by the negligence of Hanauer, or by the negligence of both, and that under no possible interpretation of the evidence could the occurrence be described as an accident.

In the Williams v. Matlin case, two automobiles were proceeding in the same direction, in the same lane and at about the same speed on Lake Shore Drive in Chicago. Plaintiff's husband was driving an automobile about 40 feet behind defendant's automobile. The defendant stopped suddenly, claiming she stopped suddenly to

avoid hitting a dog, although witnesses for the plaintiff testified they saw no dog. The plaintiff's husband applied his brakes but was unable to stop in time to avoid colliding with the rear of defendant's automobile. Plaintiff was injured and brought suit. An instruction was tendered by the defendant that if the jury believed "from a preponderance of the evidence that the plaintiff was injured as a result of an accident which occurred without the fault either of the plaintiff or of the defendant, or either of them, you are instructed the plaintiff cannot recover and you should find the defendant not guilty." The court in that case, refused to give the instruction, which was assigned as error, and the court in passing on the matter, said: "We agree with the statement of the Third Division of this court in *Rzeszewski v. Barth*, 324 Ill. App. 345, 356, that the giving of this instruction should be discouraged. It is only when there is evidence tending to show that plaintiff was injured through accident alone, not coupled with negligence, that the giving of such instruction is permissible. *Streeter v. Harriehouse*, 397 Ill. 234, 244. When proper, it merely tells the jury what should be known to the man on the street."

The case of Crutchfield v. Meyer, heretofore cited, was a case where an ice and coal truck, driven in an alley, struck and

killed a child of six years of age. An "accident" instruction was given for the defendant, and while the court held the instruction to be objectionable, it is not clear from the language of the court, whether the court reversed and remanded the case for this reason or because of improper remarks by counsel for both the plaintiff and defendant.

The opinion on Larry Lee Elbert v. John Vernon Heidbreder, 21 Ill. App. 2d 486, was filed in this Court on May 15, 1959. It was another case of a child or six being struck by a truck. In that case the child was crossing the street near his home and was struck in the middle of the street by a truck driven by the defendant. A disinterested eyewitness testified that she saw the child wait at the curb for a car to pass, and then started across the street at a fast walk, which she described as a "trot" at an angle towards his home. This witness estimated the speed of the truck at 40 miles per hour, and that she heard no horn, and no indication of the application of the brakes of the truck and that it proceeded some 50 feet forward after the impact. In that case, the defendant claimed that he did not see the boy prior to the accident and did not know he had hit anything until he felt a thud on the left rear wheel. A witness who was riding with the defendant also testified that he did not see the boy before the accident. The

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other rider in the defendant's truck testified he saw the boy just a fraction of a second before the accident. The court in passing on the giving of an accident instruction, reviewed the evidence and held that the failure of the defendant to see plaintiff while a car traveled a block was not explained in the evidence and that this absence of any reasonable explanation of defendant's failure to see that which the evidence shows was clearly visible to him, compelled the conclusion that the defendant failed to keep a proper lookout, and that accordingly, it could not be said that there was any evidence that plaintiff's injury was the result of accident alone, and held it was error to give the instruction.

Defendant cites the case of Kurzawa v. Brummel, 14 Ill. App. 2d 473, to support the accident instruction given in this case. In that case a child ran into the street from behind a parked car into the path of the defendant's car. The court in that case held the accident instruction proper. The court took note of the rule as laid down in Streeter v. Huarichouse, 357 Ill. 234, and Crutchfield v. Meyer, 414 Ill. 210, but held that in those cases there was definite evidence of negligence and not accident.

The case of Elliott v. Congress Hotel, Inc., 314 Ill. App. 287, was an injury suit against the hotel by a guest, who rose from her

chair to pick up a key she had dropped, and while she was erect, a waitress employee of the hotel, without warning to the plaintiff, removed the chair and as the plaintiff went to sit back on the chair she fell to the floor and was injured. In that case an "accident" instruction was given, and the reviewing court sustained it, holding that there was a reasonable inference from all the facts that the fall of the plaintiff was not due to any negligent or careless act on the part of the defendant, and there was no presumption of negligence from the mere happening of the occurrence. And the court held that one of the issues submitted to the jury was whether or not the defendant was guilty of negligence and in considering the facts, it appeared that no error was committed by giving the "accident" instruction.

In the Allied Mills, Inc. v. Miller case, an accident was defined as: "the result of an unknown cause or is the result of an unusual and unexpected event happening in such an unusual manner from a known cause that it could not be reasonably expected or foreseen and that it was not the result of any negligence." It was also defined in that case as: "an event that takes place without one's foresight or expectation; an undesigned, sudden and unexpected event," and "An unexpected happening not due to any negligence or malfeasance of the party concerned." And the court in that case,

found that the injury of Hanauer could have been caused by the negligence of Collebrusco, or by the negligence of Hanauer, or by the negligence of both.

The plaintiff claims that the facts in the instant case and those of Allied Mills Inc. v. Miller, case are strikingly similar. In that case the evidence showed that the driver of the truck, Collebrusco, looked away from Hanauer in order to drive the truck through a narrow passage. In this case the defendant Evans looked away from the decedent McKinney in order to control his truck. In the Allied Mills Inc. v. Miller, case the negligence consisted in the truck driver looking aside as he was negotiating a turn, knowing there was a man walking in front of the truck. In this case, the negligence consisted of looking ahead and failing to maintain a lookout to the rear, with his truck motor racing, knowing there was a man behind him. We must hold that under the state of facts shown, under no interpretation of the evidence could the occurrence be said to have happened through accident alone not coupled with negligence. Here the defendant had loaded at this particular spot several times. He knew that in order to back his truck to a proper place to load he would have to back close to the barn. He stuck his truck in the mud the first attempt to back to the proper place, and he then went forward, raced his motor to the

found that the highway was in a state of
negligence of maintenance, and the
by the negligence of the
The district court found that the
those of Miss M. H. H. and Miss M. H. H. were
In that case the evidence was that the
Goldstein, Isaacson, and Hanes
truck through a narrow road, and the
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been. He also did not see the truck
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point it could be heard roaring a quarter of a mile away, and again backed up. He was a truck driver and must be presumed to know what happens when the wheels get traction. Our courts have taken judicial knowledge of the fact that when a vehicle is trying to go forward or backward with the wheels spinning, when the wheels take hold the vehicle will suddenly move. Trainor v. McCann, 344 Ill. App. 262, 265.

The answer of the defendant does not raise the accident theory. The complaint alleged negligence on the part of the defendant and due care on the part of the decedent. The answer denied these allegations, and nowhere does the accident theory appear until it appears in the offering of an accident instruction.

An accident as defined in the Allied Mills, Inc. v. Miller case, "is the result of an unusual and unexpected event happening in such an unusual manner from a known cause that it could not be reasonably expected or foreseen and not as a result of any negligence." Here, by the admissions of the defendant, he did not have his truck under control. He knew the decedent was behind him but failed to keep a proper lookout to the rear while backing up with his motor roaring at great power with his wheels spinning. As a truck driver he should have reasonably expected that the wheels would take hold and the truck move fast. He must have foreseen that what happened could have happened and failed to take the proper steps to keep it from happening. For the reasons above stated this cause will be reversed and remanded for a new trial.

Reversed and remanded.

CARROLL and BOETH, JJ., concur.

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STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT.

General No. 10263

Agenda No. 18

Loretta Manley and Leonard Smith,
Plaintiffs-Appellees,

vs.

Herschel G. Long,

Defendant-Appellant.

Appeal from the
Circuit Court of
Christian County

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REYNOLDS, P. J.

This cause arises out of a collision between an automobile driven by the defendant, and one driven by the plaintiff, Loretta Manley, on Illinois State Route No. 48, about two miles north of Blue Mound, Illinois. The highway is a two-lane paved highway running generally north and south. Immediately prior to the collision, both cars were traveling north. The weather was clear and visibility was excellent. The time of the collision was about 2:30 P. M. The highway is straight and fairly level. About one thousand feet south of the place of collision there is a slight rise, and further south the road dips slightly, so that a driver

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coming from the south, comes out of the dip up over the rise and from there to the point of collision the road is level. The plaintiff, Loretta Manley, was driving her father's car with her brother, Robert Smith, in the front seat at her right. She was taking her father's dentures to another brother, Leonard Smith, who was to take them to the father. Some distance south of the point of collision she met Leonard and stopped her car off the pavement. Leonard, meeting her, passed her car, turned around and stopped behind the car she was driving. Robert then took the dentures to Leonard, who then drove on north. The plaintiff Loretta Manley then proceeded northward along the road with the intention of turning at the first available place and returning to her home. Her brother called her attention to a side road leading over the Wabash Railroad which paralleled the highway, and she slowed down and then turned across the south-bound lane with the intention of turning around. Mrs. Manley testified that she looked in her rear vision mirror twice, once when about 75 yards from the side road, and again when about 20 yards from the road, and saw no automobile to her rear and that there were none coming from the opposite direction. Mrs. Manley testified that she turned her turning indicator for a turn to

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the left about 75 yards from the side road and heard the clicking of the indicator. This is supported by the testimony of Robert Ray Smith, her brother, who also testified he saw Mrs. Manley pull the lever that operated the turn indicator and that he heard it clicking. He further corroborates her testimony in that he also looked to the rear when about 75 yards from the side road and saw no car coming. Loretta Manley and her brother estimate her speed at 15 to 20 miles per hour when she was making the turn. The defendant was overtaking the car of the plaintiff Manley and was in the act of passing. Defendant Long estimated that he was driving about 65 miles per hour and that when he was about 300 feet south of the Manley car he blew his horn and turned into the left hand lane. That when he was about 100 feet from her car, he saw her brakes flash and he immediately applied his brakes; that the plaintiff Manley gave no signal of her intention to turn. The Long car struck about the middle of the Manley car and knocked it into a ditch. The Long car remained upright, and was about 5 or 6 feet north of the side road when stopped. A deputy sheriff who investigated the accident immediately after it happened, testified that he found skid marks in the left or west lane southward from the point of impact and stepped them

off and that these skid marks were 185 feet long.

Suit was filed by the plaintiff Loretta Manley for her injuries, and by the plaintiff Leonard Smith for the damage to his automobile. The defendant filed his counterclaim against the two plaintiffs, for damage to his automobile. The jury found for the plaintiff Loretta Manley and assessed her damages at \$12,000 and for the plaintiff Leonard Smith and assessed his damages at \$1100. The jury returned a "not guilty" verdict on the counterclaim of the defendant. From the judgment entered on the verdicts of the jury, the defendant appeals to this court.

The appeal assigns as error the refusal of the trial court to give Defendant's Instructions No. 9 and 18, Counter-claimant Long's Instruction No. 17(a), and the giving of Plaintiff's Instructions No. 3, 4 and 6. The appeal also contends that the verdicts were excessive and against the manifest weight of the evidence.

First taking up Defendant's Instruction No. 9, which the defendant contends should have been given. The language of this proffered instruction was as follows:- "You are instructed that if you believe from the evidence in this case that the Defendant, at and prior to the accident in question, acted as a reasonable and prudent person would

have acted under like circumstances, and did nothing and omitted nothing which a reasonable and prudent person would have done under like circumstances, then you must find Defendant not guilty." The plaintiffs contend that the subject matter of Defendant's instruction No. 9 is included in Defendant's Instructions no. 3 and 7 and therefore the refusal of Defendant's Instruction no. 9 was proper. Defendant's Instructions No. 3 and 7 were in the following language:

Defendant's Instruction No. 3.

"The Court instructs the jury as a matter of law, that the Defendant Long was not required to exercise toward the Plaintiffs the highest degree of care, but said Defendant was only required to exercise toward said Plaintiffs ordinary care at the time and place of the accident in question and ordinary care is such care as a person of ordinary prudence would exercise under the same or like circumstances."

Defendant's Instruction No. 7.

"The Court instructs the Jury that negligence is the failure to exercise that degree of care and caution which an ordinarily prudent person would exercise under the circumstances; otherwise stated, it is the omission to do that which a reasonable person, guided by those

ordinary considerations which ordinarily regulate human affairs would do, or the doing of something which a reasonable and prudent person would not do.

"The law places upon all persons the duty of exercising ordinary care for their own safety to avoid injury. Contributory negligence is the failure, upon the part of a person for whose injuries or damages a recovery is sought, to exercise due care and caution for his own safety, but is himself guilty of negligence which proximately causes or proximately contributes toward bringing about or producing the injuries or damages complained of."

In comparing Defendant's Instruction No. 9 and the first part of Defendant's Instruction 7, it would seem that each states the law, but from a different approach. The first part of Defendant's Instruction No. 7 states that negligence is (a) the omission to do that which a reasonable person would do, or (b) the doing of something which a reasonable person would not do, while Defendant's Instruction No. 9 states that there is no negligence if (a) there is no omission to do that which a reasonable person would do, and (b) there is no doing of something which a reasonable person would not do. Defendant's Instruction No. 7 is positive in approach in that it defines negligence to the

jury. Defendant's Instruction No. 9 is negative in approach in that it defines what is not negligence. Both cover the same principle of law, but it would seem that the positive statement of what constitutes negligence would be ; referred to a statement of what is not negligence. If Defendant's Instruction No. 7 is sufficient, in that it defines negligence, Defendant's Instruction No. 9 is merely repetitious, or a converse statement of the same law, which is not necessary.

The defendant contends that he acted as a reasonable and prudent person would have done under the circumstances, and that he did not fail to do anything a reasonable person would have or should have done and that he was therefore, not guilty of negligence.

This question, of course, presents a question of fact for the jury. This the jury could determine by reading Defendant's Instruction No. 7 and applying the standard set out therein. If the jury concluded there was no omission to do that which a reasonable person would do and there was no doing of something which a reasonable person would not do, they would necessarily conclude there was no negligence. The same ultimate result would apply in reverse to Defendant's Instruction No. 9, that is, if the jury concluded that

there was an omission to do that which a reasonable person would do or there was a doing of something which a reasonable person would not do, they would conclude that there was negligence.

Instruction No. 3 of the defendant tells the jury that the defendant was only required to use ordinary care, and while it does not define negligence as does Defendant's Instruction No. 7, it does at least bolster and fortify the defendant's contention that he was not guilty of negligence by telling the jury that he was only required to use ordinary care and not the highest degree of care.

Defendant cites the case of Scott v. Vurdulas, 264 Ill. App. 495, in support of his position that his Instruction No. 9 should have been given. In that case an instruction almost identical to Defendant's Instruction No. 9 was refused and the appellate court held that the trial court erred in refusing to give the instruction. However, in that case, in holding the refusal of the instruction to be error, the court held that the principle of law stated in the instruction was not embodied in any other given instruction. Here, the law of negligence was given in Defendant's Instruction No. 7, so that the jury was informed of the law governing and the refusal

to give Defendant's Instruction No. 9 would not be error. The defendant was entitled to have the jury instructed on the law applicable to his case. Sims v. Chicago Transit Authority, 7 Ill. App. 2d 21; Thomas v. Chicago Embossing Co., 307 Ill. 134; Parkin v. Rigdon, 1 Ill. App. 2d 586; Kirchner v. Kuhlman, 334 Ill. App. 339. As said in the Kirchner v. Kuhlman case, at page 346: "The law is well settled that each party to a cause of action is entitled to direct and specific instructions embracing his theory of the facts where his evidence tends to prove such facts." In this case the jury was instructed as to the law of negligence by Defendant's Instruction No. 7. He was not entitled to have this law repeated in another way, in another instruction. It may well be that if the trial court had given Defendant's Instruction No. 9 no harm would have resulted but the refusal of the trial court to give the instruction where the law is adequately and properly stated in another instruction was not error.

The second point urged for reversal is that the trial court erred in refusing to give Defendant's Instruction No. 18 on comparative negligence. A reading of this instruction shows that it was an instruction on contributory negligence. Since the defendant had

a counterclaim this instruction was not proper since it applied only to recovery of the plaintiff and not to recovery of the defendant on his counterclaim. The same rules applicable to contributory negligence on the part of the plaintiffs would apply to the defendants counterclaim, but the instruction as offered only instructs as to contributory negligence on the part of the plaintiffs.

The third point urged for reversal is that the court erred in refusing Counter-plaintiff's Instruction No. 17(a). The instruction is long and we will not cumber the record with a recital of the instruction verbatim, but in brief the instruction after reciting that the defendant Long has filed his counterclaim against the plaintiffs, sets out the alleged acts of negligence he claims the plaintiffs were guilty of committing, sets out the denial of the plaintiffs to the material allegations in the counter-claim and then instructs that if the jury found the plaintiff Loretta Hanley was guilty of one or more of the alleged acts of negligence which proximately contributed to cause the collision, and that the defendant and counter-plaintiff was free of negligence, the jury might find in favor of the counter-plaintiff. Plaintiffs contend that the instruction was bad because it failed to state whether the plaintiff Loretta

Manley was the agent and servant of Leonard Smith, the other plaintiff. We see no merit in this contention. Further, that the word "material" as relating to the allegations of the counter-claim was used without defining the word. In the case of City of Fairbury v. Barnes, 228 Ill. App. 369 an instruction referring to "material allegations" without defining what are material allegations was held error.

There is another vice in this instruction in that it attempts to tell the jury that if they found the counter-defendant Loretta Manley guilty of any of the alleged acts of negligence, the jury might find in favor of the counter-plaintiff Long under his counter-claim. This language was, at least inferentially, held bad in the case of Signa v. Alluri, 351 Ill. App. 11, and in Smith v. Illinois Valley Ice Cream Co. 20 Ill. App. 2d 312.

Defendant complains of the giving of Plaintiff's Instruction No. 3, on the ground that the instruction suggested to the jury that if the defendant violated the speed laws, he was guilty of negligence, thereby creating a liability. While this instruction, after reciting that the law of Illinois is that "no person shall drive his automobile upon a highway of this State at a speed greater than is reasonable

and proper having regard to the traffic and the use of the way, or so as to endanger the life or limb or injure the property of any person," only instructs the jury that if they find from the evidence that the defendant violated this speed law, they might take this fact, if it be a fact, together with all other facts and circumstances shown by the evidence into consideration at arriving at their verdict, and does not set out in haec verba the language of the particular statute of Illinois governing speed of automobiles on the highways, it does set out the statute governing sufficiently so that the jury would not be misled by any omission of the words of the statute. The instruction is not peremptory but merely instructs the jury that it could take the fact of speed violation, if it be a fact, into consideration with all the other facts in the case. We find no error in this instruction. Our courts have said that it is not required that any one instruction should state all the law in the case, but if an instruction is correct so far as it goes, and does not assume to point out all the elements of proof necessary to a recovery and does not direct a verdict, it may be supplemented by other instructions, and omissions therefrom may be supplied by other instructions. West Chicago St. R. Co. v. Schulz,

217 Ill. 322; Smith v. Illinois Valley Ice Cream Co. 20 Ill. App. 2d 312. In this case the other instructions supplied the omissions of this one.

Plaintiff's Instructions No. 4 and 6 are complained of, but this court fails to find any error in the instructions. The evidence of the doctor who attended Mrs. Manley both before and after the collision presented such evidence as to her injury as to present a question for the jury to decide how badly she was injured and the amount of her injuries in terms of money, and we are not disposed to disturb the jury's findings on this matter. The use of life expectancy tables has been sanctioned and approved by Illinois courts for a long time. The defendant claims that the two instructions presumed that Mrs. Manley would have future suffering and loss of health and would be totally disabled during her life expectancy. A reading of the two instructions does not support this contention.

The defendant complains that the verdicts were excessive. As to the verdict for damages to the automobile, the value before and after the collision was shown and the verdict as to damages to the automobile is consistent with the values shown. As to the damages awarded to Loretta Manley, this is a question of fact to be arrived

at and determined by the jury, and unless clearly and palpably excessive, this court will not interpose its judgment for that of the jury. This is likewise true as to the last point of the defendant, namely, that the verdicts were against the manifest weight of the evidence. Our courts have held so many times, that citation of authorities is not necessary, that determination of fact by a jury will not be disturbed by the reviewing court, unless clearly and palpably erroneous.

Affirmed.

CARBOLL and BOETH, JJ., concur.

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STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT

General No. 10270

Agenda No. 24

Raymond A. Primmer,
Plaintiff-Appellee,

vs.

Walter Hunter,
Defendant-Appellant.

Appeal from the
Circuit Court of
Piatt County.

REYNOLDS, P.J.

Plaintiff recovered judgment against the defendant in the Circuit Court of Piatt County, in the amount of \$2500.00. The defendant appeals to this court.

This is a case of a pedestrian being injured by a car driven by the defendant. Plaintiff was standing in the east half of an oil-surfaced road which was about sixteen feet wide. The road had been crowned but there was no actual ditch on either side, with the oiled portion being sixteen feet wide, with a four foot gravel shoulder on each side. The road was dry and visibility was good. Plaintiff was talking with one Roy Snell about fishing and farming. Snell's truck was parked on the east side of the road, with about

half of the truck on the oiled portion. Plaintiff was standing between the truck and the center of the road with his foot on the running board of the Snell truck, talking to Snell. The testimony shows that the plaintiff was some three or four feet east of the center of the road. Defendant drove past the point where the plaintiff was standing, and in doing so was required to and did pull to the left and around the plaintiff. Defendant was driving a 1957 Chevrolet about three months old with good brakes. The plaintiff's truck was parked about twenty feet north of the Snell truck on the east side of the road with part of plaintiff's truck on the oiled portion and part on the shoulder of the road. The defendant after passing the two trucks drove north along the road and into the flood waters of the Sangamon River, which were several inches deep. From the point where the Snell truck was parked to the flood waters was about two hundred feet and the road sloped downward slightly. The defendant's car proceeded into the water about two or three car lengths. At this point the defendant started backing his car to the south and towards the point where the plaintiff was standing. He was backing on the west half of the road. There was a place where he could have turned around but he did not do so. He backed his car until he was at a point nearly opposite the

Snell truck, when his car swerved to the east side of the road, striking the plaintiff. It is admitted that there was ample space for the car to have backed past the Snell truck without getting on the east side of the road. It is admitted that the defendant was not looking toward the plaintiff while he was backing his car and put on his brakes only when his companion in the car called "look out". The plaintiff admits he saw the defendant backing his car but that he paid him no attention until the defendant's car swerved. He then tried to get out of the way but was unable to do so. The evidence shows that no horn signal was given.

There is very little dispute as to the facts or the injuries of the plaintiff, except that the defendant complains that the damages awarded were excessive in view of the amount of out-of-pocket expense on the part of the plaintiff, and the fact that the plaintiff was able to farm about as well as before his injury. This is not the proper test as to damages, and since the jury has fixed the amount of damages, this court will not disturb that finding.

The appeal is on the theory that the plaintiff was guilty of contributory negligence as a matter of law and that the trial judge should have directed a verdict in favor of the defendant, and that the jury was not properly instructed.

As to the contention of contributory negligence, it is urged that the plaintiff, by his admission of seeing the defendant backing

his car, and paying no attention further to him, is such a judicial admission as to a fact or facts that would constitute contributory negligence as a matter of law. If such admission constitutes contributory negligence as a matter of law, then the court should have allowed the defendant's motion for a directed verdict for the defendant. As stated in the defendant's brief, contributory negligence becomes a question of law when it can be said that all reasonable minds would reach the conclusion under a particular factual situation, that the facts did not establish due care and caution on the part of the plaintiff, and in such cases the court should instruct the jury to render a verdict for the defendant. This undoubtedly, is the law in Illinois. Tucker v. N.Y.C. & St. L.R.R. Co., 12 Ill. 2d 532; Carrell v. New York Central Railroad Co., 384 Ill. 599; Greenwald v. Baltimore and Ohio Railroad Co., 332 Ill. 627. The difficulty lies in applying this law to the facts. Here, the defendant was backing his car toward the plaintiff, some two hundred feet away at first. The plaintiff was talking to Snell and admitted that he saw the defendant backing his car and that he did not pay any further attention to the car of the defendant. Plaintiff was standing on the east side of the road and the defendant was backing up on the west side of the road. The road was sufficiently wide for the defendant to have backed his car past the plaintiff without

coming within three or four feet of where the plaintiff was standing. Suddenly, for some reason that is not clear, the defendant's car swerved and hit the plaintiff. Because the plaintiff did not watch the car of the defendant from the time the defendant starting backing until just before the impact, because the plaintiff was standing in the road, which was a country road and not heavily traveled, the defendant contends that the plaintiff was, by his own admission, guilty of contributory negligence. While the admission of the plaintiff that he was not watching the car of the defendant is entitled to considerable weight, the weight to be accorded this admission is a question for the jury. There is no such factual situation here, that all reasonable minds would reach the conclusion that the plaintiff was not using due care and caution for his own safety. Our courts have held in many cases, that such a question is a question of fact for the jury. Briske v. Village of Burnham, 379 Ill. 193; Blumb v. Getz, 366 Ill. 273; Geraghty v. Burr Oak Lanes, Inc., 5 Ill. 2d 153; Ritter v. Hatteberg, 14 Ill. App. 2d 548; Cloudman v. Beffa, 7 Ill. App. 2d 276. And even where the facts are admitted as they are here, or are undisputed, but where there is a difference of opinion as to the inference that may legitimately be drawn from them, the question of negligence and contributory negligence ought to be submitted to a jury - it is primarily for the jury to draw the inference. Cloudman v. Beffa, 7 Ill. App. 2d 276, 284. The plaintiff

was not in the lane in which the defendant was backing his car, he was some three feet away from that lane. He was standing in the road, it is true, but it could equally be contended that he could assume, as a reasonable and prudent man, that the defendant would stay in the west lane. The defendant contends that the plaintiff knew the effect of water on the brakes of an automobile. This knowledge was shared by the defendant, by his own admission. Apparently, when the defendant's companion yelled "look out" the defendant applied his brakes and his car slewed around and went directly toward the plaintiff. Up to that time the plaintiff had no knowledge of danger and unless this court should hold as a matter of law, that the acts of the plaintiff in standing in the road, and not paying attention to the car of the defendant constitutes such careless or negligent acts as to his own safety, to be contributory negligence as a matter of law, we would not be justified in overruling the finding of the jury on a question of fact. The facts were admitted, but the inference to be drawn from them is a question of fact for the jury.

While it is another facet of the same question, the contention that the trial court should have directed a verdict for the defendant on the admitted facts, presents a question that is quite similar to that of whether or not the plaintiff was guilty of contributory negligence as a matter of law. A motion for a directed verdict presents the single

question whether there is in the record any evidence which, standing alone and taken with all its intendments most favorable to the party resisting the motion, tends to prove the material elements of his case. Romines v. Illinois Motor Freight, Inc., 21 Ill. App. 2d 360; Lindroth v. Walgreen Co., 407 Ill. 121; Mitchell v. Van Scoyk, 1 Ill. 2d 160; Tidholm v. Tidholm, 391 Ill. 19; Parrucci v. Kruse, 12 Ill. App. 2d 30. In the instant case, there was sufficient evidence of negligence on the part of the defendant to justify submitting the question of negligence of the defendant to the jury. Our courts have held in many cases, that the verdict of a jury as to a question of fact should not be disturbed by a reviewing court unless such verdict is manifestly and palpably against the weight of the evidence. Koch v. Lemmerman, 12 Ill. App. 2d 237; Ashby v. Irish, 2 Ill. App. 2d 9; Hanck v. Ruan Transport Corp., 3 Ill. App. 2d 372. It may well be, that no one of the acts of the defendant would be sufficient to constitute negligence. The failure to sound a signal, the speed at which the defendant was backing his car, the skidding or slewing about of the defendant's car, or the knowledge that water on the brakes might affect their efficiency, considered individually may not be sufficient to establish negligence on the part of the defendant, but considering all these matters as a whole, they present a factual situation that must be submitted

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

to the jury. The jury having decided that the defendant was negligent, this court will not substitute its judgment for that of the jury.

The defendant complains of the giving of Plaintiff's Instructions Nos. 1, 3 and 6 and the refusal to give Defendant's Instruction No. 6. In reading the record, we cannot ascertain which instructions were tendered by the plaintiff and which were tendered by the defendant. The instructions are not numbered. This practice has been condemned in People v. Todaro, 14 Ill. 2d 594, People v. Harvey, 12 Ill.2d 88, People v. Husband, 4 Ill. 2d 451. Those cases hold that error cannot be predicated upon the giving, refusal or modification of instructions unless the record shows at whose request the instructions were given. In this case, the record on appeal only shows the instructions given, without disclosing or showing whether they were instructions tendered by the plaintiff or the defendant.

For the reasons above stated, the judgment of the Circuit Court is affirmed.

Affirmed.

CARROLL and ROETH, JJ., concur.

STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT

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General No. 10269

Agenda No. 23

Charles W. Price, as Administrator
of the Estate of Margaret Ann Price,
deceased,

Plaintiff-Appellant,

vii.

Robert Wayne York, Community Unit
School District No. 300, Sullivan,
Illinois, and Ralph Yancy,

Defendants-Appellees.

Appeal from the
Circuit Court of
Coles County

CARROLL, J.

Charles W. Price, as administrator of the estate of Margaret Ann Price, deceased, brought this action to recover damages for his intestate's wrongful death.

Count II of the amended complaint is directed against Community Unit School District No. 300, Sullivan, Illinois, and Ralph Yancy, and it alleges that on April 18, 1958, the decedent was 3 years of age and lived with plaintiff at Coal Station, Illinois, directly adjacent to Illinois Route 121 which is a two-lane paved highway running in a northwesterly and southeasterly direction; that the defendant School District owned and operated school buses used to transport children to and from its

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school; that defendant Yancy was employed by said defendant District to operate one of said buses; that the home of decedent was located at the intersection of said Route 121 with a north-south rural road which extended southward across Route 121 and connected with an east-west road which intersected to the west with another north-south road; that this last described north-south road intersected with said Route 121 approximately one mile north of decedent's home; that the said rural roads and paved highway formed a circular route which passed the home of said decedent; that students including the decedent resided on said circular route and were picked up by the school bus driver Yancy; that if in serving said circular route the bus entered the same at the intersection one mile north of decedent's home and then proceeded south and then eastward and then north to the home of decedent, the distance travelled would be the same as would be involved in proceeding in the opposite direction; that entering the said circular route at the point north of decedent's home instead of entering the same by driving in the opposite direction or south on said Route 121 would require no additional mileage, expense or travel nor would it cause any children on said route to cross Route 121 to board said bus; that entering the circular route by going south on Route 121 required decedent to cross said highway to board said school bus; that by entering said route from the opposite direction the bus would pass directly in front of decedent's home and she would enter the same without crossing Route 121, which is heavily travelled by high speed traffic; that defendants owed a

duty to enter said circular route at the point near the home of decedent; that prior to April 18, 1958, decedent's mother requested Yancy to enter the route so as to avoid the necessity of decedent crossing Route 121 to board his bus; that Yancy failed and refused to do so; that on April 18, 1958 as decedent was crossing Route 121 to board the said school bus, she was struck and injured by a car travelling on said highway; that she died on said date as a result of her injuries; that the proximate cause of decedent's injury and death was the negligence of defendant Yancy or the defendant school district in refusing and failing to enter the said circular route which caused decedent to cross said Route 121 to board said bus; that decedent an plaintiff as administrator and the next of kin of said decedent were at the time of the occurrence in the exercise of due care for the safety of decedent.

It is further alleged in the complaint that the doctrine of immunity does not apply to the defendant school district for the reason that said district on the date of the occurrence carried a policy of insurance covering liability of said district for the negligence of its employees.

We omit further recital of the allegations of Count II as the same are not pertinent on this appeal. Likewise, we are not concerned with Count I of the amended complaint in which the defendant Robert Wayne York, driver of the car which struck decedent, is charged with negligence.

The defendant, Community Unit School District No. 300, and Ralph Yancy, each filed a motion to dismiss Count II of the

amended complaint on the ground that said count failed to state a cause of action against said defendants. The court allowed said motions and dismissed Count II with prejudice and pursuant to Section 50 (2) of the Civil Practice Act, made a finding that there was no just reason for delaying appeal.

The sole question presented to this court is whether Count II of the complaint states a cause of action. In negligence actions, it is necessary to allege three things: (1) existence of a duty on the part of the defendant to protect plaintiff from the injury of which he complains; (2) failure of defendant to perform such duty; (3) that plaintiff was injured thereby. Absence of any one of these elements is fatal. Miller vs. S. S. Kresgo Co. 306 Ill. 104; Lasko vs. Meier, 394 Ill. 71; Falters vs Christy, 5 Ill. App. 2d, 63. Negligence is a breach of duty and where there is no duty or breach there can be no negligence. Campion vs. Chicago Landscape Co. 295 Ill. App. 225.

Plaintiff alleges that there existed on the part of defendant a duty to reverse the direction of travel of their school bus on the circular route so as to obviate the necessity of the decedent crossing a dangerous and heavily travelled state highway in order to board said bus. This allegation would appear to be susceptible of no other meaning than that there rests upon the operators of school buses a duty to drive their buses in such direction or directions as would make it unnecessary for a child boarding one of said buses to cross a public highway.

In considering the question whether any such duty existed, it must be borne in mind that the complaint alleges that

the injury complained of occurred as decedent crossed Route 121 at a point opposite her home. It is not alleged that the bus was at the point opposite her home at the time decedent crossed the highway or that she was injured by any movement of said bus. It thus appears that since decedent was not injured while on the bus the duty alleged is in no way related to the care which a school bus operator must exercise when conveying children to and from school. We are concerned only with what duty, if any, rested upon defendants to protect decedent from injury while she was walking from her home to the point where the bus stopped or would stop to pick her up. The parties cite no cases nor has our research disclosed any wherein the above proposition has been considered by the courts.

Plaintiff directs the court's attention to the rule that a public carrier owes a duty to its passengers to provide a safe place for boarding and alighting from its conveyance and cites numerous cases in support thereof. Such rule is well established but it is of no assistance to plaintiff for the simple reason that the decedent was not boarding or getting off the bus nor was she a passenger on the same.

Van Cleave vs. Illini Coach Co. 344 Ill. App. 127 cited by plaintiff is not in point as in that case plaintiff was a student on board a bus owned by defendant and was injured when the vehicle was suddenly propelled forward causing another student to fall against plaintiff. The court held it to be the duty of those conveying children to and from school to exercise toward them the highest degree of care consistent with the practical operation of the bus. In the instant case the complaint does not charge that plaintiff's intestate was being transported to or from school, but that she was injured while walking across a highway.

Plaintiff also cites a number of cases holding it to be the duty of a public carrier to provide a safe place for boarding and alighting from its conveyance. These decisions shed no light on the issue raised on this appeal which involves only the question as to whether a school district owes a duty to lay out its bus routes in such a manner as to obviate the necessity of any child picked up by its buses crossing a highway to reach a bus. We think that to sustain plaintiff's argument would in effect amount to holding that it is the duty of the operator of a school bus to exercise the highest degree of care towards the students, not only when the child is boarding, alighting from, or riding on a school bus but also while such child is walking or being conveyed from his or her home to the point where the bus may be expected to stop. Plaintiff's counsel does not suggest any practical manner in which the defendant or any other school bus operator could discharge such a duty. If, as plaintiff alleges, defendant has the duty of routing its buses so that no child using said bus will be required to cross a highway, then such duty rests upon all school districts in this state which furnish bus transportation to its students, regardless of whether the buses travel a circular route. Compliance with such a requirement would in many instances seem entirely impractical. We find no provision in the School Code which in any manner suggests the manner in which a school district shall operate its transportation facilities. If plaintiff's contention were sustained, it would amount to holding that a school district operating buses owes the duty of escorting students from their respective homes to a bus stop. We think there is no reasonable basis to support recognition of such a duty.

Upon careful consideration of plaintiff's contentions, we are convinced that the same cannot be sustained and that the trial court did not err in dismissing the complaint for failure to state a cause of action.

Affirmed.

REYNOLDS, P.J. and ROETH, J., concur.

STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT

General No. 10258

Agenda No. 16

Ina Dykes,)	
)	
Plaintiff-Appellee,)	
)	
vs.	)	Appeal from the
	)	Circuit Court of
Benefit Association of Railway	)	McLean County
Employees,)	
)	
Defendant-Appellant.	)	23

Roeth, J.

Plaintiff recovered a judgment after a jury verdict against defendant upon a hospital and surgical benefits policy issued by the defendant. This appeal is prosecuted to reverse that judgment.

The facts as shown by the record are as follows. The plaintiff, Ina Dykes, and her husband live in Bloomington, Illinois. She is a housewife and he is and has been employed by the G M & O Railroad as an engineer since 1942. For a long period of time prior to the occurrence in question, the plaintiff was covered by a group hospital insurance policy issued by defendant to employees of the G M & O Railroad. On January 10, 1958, plaintiff received from the company a notice of termination of this group policy. Five days later, one Erich Meseke called upon the plaintiff

and her husband at their home in Bloomington. According to the testimony of plaintiff and her husband, Mr. Meseke stated that he was a representative of the defendant and that since the group policy was being terminated he wanted to sell the plaintiff an individual policy in the same company with exactly the same coverage and a continuous coverage that would pick up immediately on the date of the expiration of the group policy, which was February 1, 1958. He told them that he was there to acquire their signatures before the group policy expired so there would be no waiting period in the policy. Mr. Meseke, who testified for the plaintiff, corroborated plaintiff and her husband as to the visit and purpose thereof and testified he told them that in his opinion the new policy would afford continuous coverage from the date of termination of the group policy without any initial waiting period. Both plaintiff and Mr. Meseke testified that plaintiff and her husband were concerned over whether this new policy would afford continuous coverage without a waiting period so that there would be no gap in the coverage from the date of the termination of the group policy and the effective date of the new policy.

The plaintiff did not purchase the policy on Mr. Meseke's first visit. However, two days later, on the 17th of January, the plaintiff filled out the application which she and Mr. Meseke both signed, he signing as the "licensed agent of the defendant

insurance company. She handed Mr. Meseke the premium and Mr. Meseke left. The application which was signed made no mention of any 30 day waiting period.

On February 12, 1958, plaintiff consulted a doctor about a general tired feeling and condition which she had first noticed about December 1, 1957. After x-rays, her condition was diagnosed as due to a tumor of the colon and the next day she was hospitalized and the tumor was subsequently removed.

On February 14, 1958, the new policy was delivered at plaintiff's home in the mail. The policy was signed by the president and secretary of defendant and countersigned by Mr. Meseke as "Licensed Resident Agent". The effective date is designated as February 1, 1958, and the insuring clause insures plaintiff, among other things, against loss due to hospital confinement from (b) sickness which is contracted after this policy has been in force for 30 days". The policy had been mailed to plaintiff from Congerville, Illinois, where Mr. Meseke resided.

Plaintiff's husband examined the policy upon receipt thereof and noticed the clause in it above set out. He immediately tried to reach Mr. Meseke by phone, and being unsuccessful mailed a card to him. On February 24th or 25th Mr. Meseke called upon plaintiff and her husband at the hospital. According to them,

plaintiff's husband said to Mr. Meseke, "You sold us a policy with continued coverage here", whereupon Mr. Meseke replied, "That is right", and then plaintiff's husband said, "All this policy says there is a 30 day waiting period", to which Mr. Meseke replied, "Well I can't help that, I sold you a policy without any waiting period". When asked if the company would pay plaintiff's claim, Mr. Meseke said, "Yes, I don't see any reason why they shouldn't". Mr. Meseke testified that it was possible that this conversation took place.

Thereafter Mr. Meseke furnished plaintiff with claim blanks and a claim was made to defendant on two occasions, which the defendant refused to pay.

In addition to the foregoing the record shows that Mr. Meseke testified that he was an agent for the defendant from January 15, 1957, to April 1, 1958; that he sold hospitalization and health and accident insurance for defendant during this period; that he made other sales of policies for defendant like that made to plaintiff; that he received the policy in question and mailed it to plaintiff.

Defendant's counsel did not make an opening statement or closing argument. None of plaintiff's witnesses were cross-examined. No evidence was offered on behalf of the defendant and no instructions to the jury were tendered on behalf of defendant.

Counsel for plaintiff contends that Meseke was the agent of defendant and relies upon waiver and estoppel to overcome the 30 day waiting period in the policy. Counsel for defendant make only two contentions (1) that waiver and estoppel are not properly pleaded, and (2) that the evidence conclusively shows that Meseke was merely a soliciting agent and had no power to waive the 30 day provision of the policy and that accordingly the trial court should have directed a verdict for defendant.

In support of the first contention counsel for defendant makes the point that waiver or estoppel of a provision of the policy must be pleaded in the initial pleading. To understand the basis for this contention, some background is necessary. The original complaint did not allege a waiver or estoppel. During the course of the introduction of evidence, counsel for defendant made objection to certain testimony on the ground that waiver and estoppel were not alleged in the complaint. Counsel for plaintiff then asked, and was granted leave without objection to amend the complaint. An amendment to the complaint alleging waiver and estoppel was filed on the same day that leave was granted. Counsel for defendant relies upon pence vs. Washington National Insurance Company, 320 Ill. App. 149, 50 N.E. 2d 128, in support of the above point. In that case a complaint was filed to recover on an insurance policy. The answer simply admitted or denied the

allegations of the complaint without setting up new matter. Subsequently plaintiff filed a reply which undertook to plead an estoppel. The trial court denied a motion to strike the reply. In holding that the reply should have been stricken the court said:

"The function of a replication is to reply to any new matter set up in an answer or plea. A reply can not supply omissions in a complaint, add new grounds of action, or permit the taking of a position inconsistent with that alleged in the complaint. (Citing cases)" *** "It has been held that waiver or estoppel must be pleaded in the initial pleading. (Citing cases)".

Obviously, this case has no application to the case at bar. The amendment became a part of the initial pleading, i.e., the complaint.

In support of the second contention counsel for defendant rely upon Rozgis vs. Missouri State Life Insurance Company, 271 Ill. App. 155; Spence vs. Washington National Insurance Company, 320 Ill. App. 149, 50 N.E. 2d 128; and Silberman vs. Washington National Insurance Company, 329 Ill. App. 448, 69 N.E. 2d 519. These cases hold that an agent having authority only to solicit applications and forward the same to the home office is a soliciting agent and has no power to waive the provisions of a policy. The statement of this rule, however, necessarily assumes that the agent is a soliciting agent only. On the other hand, counsel for plaintiff contend that a person clothed with the power to solicit insurance,

receive the application and forward it to the company, receive and deliver the policy and collect the premium, is a general agent and has power to waive a condition of the policy notwithstanding that power is negatived by provisions of the policy and his contract of employment and cites Hancock Life Insurance Co. vs. Schlink, 175 Ill. 284, 51 N.E. 795; Colky vs. Metropolitan Life Ins. Co., 320 Ill. App. 120, 49 N.E. 2d 830; Gunn vs. Minnesota Mutual Life Ins. Co., 322 Ill. App. 313, 54 N.E. 2d 596.

Counsel for defendant contend that the testimony of Meseke conclusively shows that he was only a soliciting agent. They place great reliance on the testimony of Meseke where in detailing the circumstances surrounding his first meeting with the plaintiff he said, "I was soliciting, or trying to promote additional business here in Bloomington". We do not think that this testimony conclusively demonstrates that Meseke was a soliciting agent only. At best it could only create a question of fact as to the extent of Meseke's agency, to be considered with all the other testimony bearing upon this issue. And, it must be remembered that defendant offered no evidence upon the trial of this case. The extent of Meseke's agency being an issue in the case, and plaintiff having shown by her evidence some facts showing a general agency, it was incumbent on the insurance company to produce such evidence as was in its possession, if any existed, proving or tending to prove

the extent of Mescke's agency. Pardon vs. Masvary, 249 Ill. App. 327. Further, the defendant did not see fit to require Mescke to produce his license to determine whether he held a soliciting agent license only. It is only where a court can say on all the evidence and inferences tending as a matter of law to prove facts, that a person is a soliciting agent only, that a verdict should be directed. Such is not the situation in the case at bar.

We are of the opinion that the judgment of the trial court was correct and should be affirmed.

Affirmed.

REYNOLDS, P.J. and CARROLL, J., concur.

47785

CHICAGO SAVINGS AND LOAN ASSOCIATION,
an Illinois corporation,

Appellee,

v.

PAUL V. BYRNE, JR. and JEAN C. BYRNE,
his wife,

Appellants.

APPEAL FROM THE

MUNICIPAL COURT

OF CHICAGO.

MR. PRESIDING JUSTICE MURPHY DELIVERED THE OPINION OF THE COURT.

This is a forcible entry and detainer action, based on the forfeiture of articles of agreement for a warranty deed. In a trial by jury, and at the close of all of the evidence, the court granted plaintiff's motion for a directed verdict and entered judgment for possession. Defendants appeal.

Plaintiff sued for possession of a single-family dwelling at 4906 South Ellis Avenue, Chicago, Illinois. Paul V. Byrne and Jean C. Byrne, his wife, purchased it in October, 1950, and with their family have resided in it since that time. The purchase price was \$27,750, of which \$12,250 was financed through a mortgage loan with the Aetna Insurance Company. On March 15, 1954, defendants obtained a new mortgage loan for \$15,000 from the plaintiff, Chicago Savings and Loan Association, using part of the proceeds to retire a balance due on the old mortgage loan. Defendants defaulted on the new loan in 1956, and plaintiff instituted foreclosure proceedings. The premises were sold to plaintiff at a master's sale on July 1, 1957, for the sum of \$19,600.

In September, 1957, plaintiff and defendants executed three documents--a warranty deed from defendants to plaintiff, dated September 14, 1957; an option to purchase from plaintiff to defendants, dated September 16, 1957, and expiring October 1, 1957, purchase price being "\$20,356.66 loan balance as of 10/1/57"; and articles of agreement for a warranty deed, dated September 16, 1957, with plaintiff as seller and defendants as purchaser of the premises for the sum of \$20,356.66, payable in monthly installments of \$338 per month, commencing on the first day of October, 1957, with interest at the rate of 6% per annum, payable monthly.

Defendants failed to make payments of principal and interest as provided for in the articles of agreement, and on November 25, 1958, they were served with a declaration of forfeiture, dated November 17, 1958. On February 19, 1959, plaintiff commenced the instant proceedings in the Municipal Court of Chicago, in which defendants filed their appearance and jury demand. A jury trial resulted in the court granting plaintiff's motion to instruct the jury to return a verdict that the right of possession to the premises was in the plaintiff, and it is from a judgment for possession on that verdict that defendants appeal.

Defendants' principal contention is that the warranty deed, option and contract to purchase should be construed together and were intended to be a mortgage and, therefore, a defense to a statutory forcible entry and detainer action.

The deed, option and agreement to repurchase should be construed together in the light of the facts and circumstances, which led to their execution, in order to ascertain the intention and purpose of the parties at the time these instruments were executed. If any part of the mortgage debt was left subsisting, and was not discharged or completely satisfied by the conveyance, and the defendants can be regarded as still owing and bound to pay it at some future time, so that the payment stipulated for in the agreement to reconvey is, in reality, the payment of that part of the existing debt which was not discharged or satisfied by the conveyance, then the whole transaction amounts to a mortgage, whatever language the parties may have used. (State Bank of St. Charles v. Burr, 283 Ill. App. 337 (1936); Totten v. Totten, 294 Ill. 70 (1920).) If no relationship of debtor and creditor is left subsisting, then the transaction is not a mortgage but a mere sale and a contract to repurchase. (Keithley v. Wood, 151 Ill. 566 (1894).) Inadequacy of price at the time the instruments were made is also a fact that can be taken into consideration in deciding whether an instrument is a deed or a mortgage. (Totten v. Totten, 294 Ill. 70.) Mere inadequacy of price will not be considered as sufficient to set aside a deed or to have a deed declared a mortgage. McDonnell v. Holden, 352 Ill. 362 (1933).

The record justified the trial court in concluding that there was no intention of the parties to leave any part

of the debt subsisting and unsatisfied by the conveyance, or to regard the grantors as still owing and bound to pay any part of the debt at a future time. The option to purchase stated that the conveyance was in full payment, satisfaction and discharge of the indebtedness and interest thereon, and that the note was canceled, satisfied and extinguished, and that "all persons liable thereon are hereby released and discharged from said indebtedness." The fact that the option purchase price was the same as the unpaid balance of the mortgage loan as of October 1, 1957, does not show that the debt was left subsisting, or that the articles of agreement were in reality the payment of an existing debt. There is no existing debt or obligation which the plaintiff can enforce by foreclosure proceedings. Kelly v. Lehmann, 297 Ill. 33, 59 (1921).

Defendants contend further that plaintiff is not entitled to any relief in a forcible detainer proceeding, because defendants did not obtain possession from plaintiff under the contract to repurchase. (Clause 5, Section 2 of the Forcible Entry and Detainer Act). (West v. Frederick, 62 Ill. 191 (1871); Aurner v. Pierce, 106 Ill. App. 206 (1903).) Later cases have held that actual prior possession is not indispensable as a basis for actions for forcible detainer under all but clause 1 of section 2 of the Forcible Detainer Act (Ill. Rev. Stat. 1957, Ch. 57). "The manifest legislative intent disclosed by section 2 is that only in cases brought under the first clause is the action primarily one for

re-possession, and that the remedy afforded by the remaining clauses is not restricted to those who were originally in possession of the land but also extends to the persons presently entitled to the possession after a demand in writing." West Side Trust and Savings Bank v. Lopoten, 358 Ill. 631, 639 (1934); Craig v. Launer, 346 Ill. App. 234 (1952); Personal Home Mtg. Co. v. Seegrin, 275 Ill. App. 419, 437 (1934); 19 I.L.P., Forcible Detainer, p. 517.

The question presented by plaintiff's motion was whether there was any evidence in the record which, when viewed in its aspect most favorable to defendant, fairly tended to prove a defense to the cause of action. Weinstein v. Metropolitan Life Ins. Co., 389 Ill. 571, 576 (1945); Hadden v. Fifer, 339 Ill. App. 287, 291 (1949).

We conclude the record justified the trial court in instructing the jury to return a verdict for possession, and for the reasons expressed herein, the judgment is hereby affirmed.

AFFIRMED.

KILEY AND BURMAN, JJ., CONCUR.

ABSTRACT ONLY.

47847

JOSEPH C. SERCKIE,

Appellant,

v.

CONTINENTAL ILLINOIS NATIONAL BANK
AND TRUST COMPANY OF CHICAGO, as
Trustee, et al.,

Appellees.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

MR. PRESIDING JUSTICE MURPHY DELIVERED THE OPINION OF THE COURT.

Plaintiff sued to enforce alleged rights under an agreement entered into by the Chicago Transit Authority and Local 308 of the Employees' Union, providing for a plan known as the "Retirement Plan for Chicago Transit Authority Employees." His suit was dismissed for want of equity, and he has appealed.

The stipulation as to facts shows that between April 5, 1915, and December 7, 1955, plaintiff was employed as a conductor by the Chicago Transit Authority or its predecessor corporation, and during this period was a member in good standing of Local 308; that the Chicago Transit Authority discharged him on December 7, 1955, for what it believed to be cause, after investigating two passenger complaints charging him with larceny; that no criminal action was brought against him, and he did not use his statutory administrative remedy for review of his discharge; that at the time of discharge he was sixty years of age, was covered by the Retirement Plan and had made the required contributions; that the Plan provided for a normal retirement at sixty-five years of age and for early retirement

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benefits for those who had attained fifty-eight years of age and voluntarily retired; and that at the time of discharge plaintiff came within the "early retirement" requirements but had not, prior to discharge, sought to avail himself of it. The stipulation further provided "that the issue to be submitted to the Court is whether or not the plaintiff, irrespective of whether or not he was discharged for cause on December 7, 1955, was, by reason of the fact that he had attained the age of fifty-eight (58) years, entitled to said old-age retirement of \$1,300.07 per year * * *."

The chancellor found "that while plaintiff was an employee he made no application for early retirement * * * and did not attempt to apply for early retirement until after his discharge," and dismissed his amended complaint for want of equity. Plaintiff's theory is that the Retirement Plan vested contractual rights in plaintiff, and that irrespective of whether or not he was discharged for cause on December 7, 1955, he was entitled to "early retirement" benefits because he had worked for the company for more than forty years and had attained and passed the fifty-eight year age requirement.

Defendants argue that plaintiff had been discharged and, therefore, was not an employee when he applied for early retirement and did not meet the requirements of the Plan; that it was his own wrongful conduct which brought about his discharge and terminated his employee status; and that the doctrine of

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substantial performance does not apply where there is a willful departure from the contract. (Shepard v. Mills, 173 Ill. 223, 228.) They admit that if plaintiff had remained an employee in good standing and committed no wrongdoing, that his discharge, and had applied for early retirement, that sufficient service and had reached the age which would have entitled him to "early retirement" benefits under the Plan.

This Retirement Plan was a collective bargaining agreement, and we believe plaintiff had a vested interest in the retirement fund and was entitled to its benefits upon satisfying the requirements as to age and service. (Vallejo v. American Railroad Co. of Puerto Rico, 188 F.2d 513; Lowe v. Feldman, 168 N. Y. Supp.2d 674.) The Plan contained no provision for his disqualification in the event of involuntary separation from the employment of the Chicago Transit Authority. His early retirement rights had matured at the time of his discharge. To refuse him "early retirement" benefits because his application came after the termination of his employment is to enforce a condition precedent which is not contained in the Plan.

Defendants argue that to permit plaintiff to retain the right of early retirement, even after he had become qualified for it, would be to give an immunity against the consequences of wrongdoing, and early retirement would become a shield and refuge for the wrongdoer. We believe the conventional and traditional penalties for wrongdoing developed by society should be sufficient punishment for wrongdoers. We believe our conclusions dispose of

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defendants' other contentions.

Accordingly, the decree is reversed and the cause is remanded to the Circuit Court of Cook County for the entry of a decree in accordance with the views expressed herein.

REVERSED AND REMANDED.

KILEY AND BURMAN, JJ., CONCUR.

ABSTRACT ONLY.

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT - FIRST DIVISION
October Term, 1959

SYLVIA ADAMSON, Plaintiff -)	
Appellee and Cross-Appellant,)	
	)	Appeal from
vs.)	
	)	the Circuit Court
PEORIA CITY LINES, INC. a)	
Corporation, Defendant-Appellee	)	of Peoria County.
and)	
BOND LOAN COMPANY, a Corporation)	
Defendant-Appellant.)	

DOVE, J.

This is an action brought by Sylvia Adamson against Peoria City Lines, Inc. a corporation, Bond Loan Company, a corporation, and Wm. R. Lowe to recover damages for injuries which plaintiff sustained when she was a fare paying passenger on a bus owned and operated by the defendant, Peoria City Lines, Inc.

At the conclusion of the evidence the plaintiff dismissed her action against Wm. R. Lowe and the jury returned a verdict finding the defendant Peoria City Lines not guilty and a verdict finding Bond Loan Company guilty and assessing the plaintiff's damages at \$20,000.00. Upon the verdict appropriate judgments were rendered and the Bond Loan Company appeals and the plaintiff has filed a notice of cross-appeal against Peoria City Lines, Inc.

It is the contention of counsel for appellant, (a) that during the course of the trial the court erred in its rulings upon the admission and rejection of evidence; (b) that the argument

of counsel for the plaintiff was inflammatory and prejudicial; (c) that the verdict is against the manifest weight of the evidence; (d) that the verdict is excessive and finally (3) that two instructions tendered by appellant should have been given.

The record discloses that the plaintiff, a married lady, 47 years of age had boarded the bus about 9:30 o'clock on the morning of October 9, 1956 and was going to her place of employment. She occupied a seat next to the window, four seats from the front of the bus on the north or left side as it proceeded east on Fifth Street. State street is a north and south street and intersects Fifth Street. Both streets are brick paved, State Street being approximately 35 feet in width and Fifth Street about 37 or 38 feet wide. There are no traffic signals or signs of any kind at this intersection. The day was bright, and clear and the pavement dry.

John O. Gorman testified on behalf of the plaintiff to the effect that he was 43 years of age, had been in the employ of the bus company as a driver for fourteen years and was driving the bus on which plaintiff was a passenger on the morning of the accident. He stated that as the bus approached the intersection it was traveling about 25 miles per hour; that when the bus was within a couple of feet of the west side of State Street he saw the Ford Automobile driven by Mr. Lowe for the first time; that it was then about 50 feet south of the south curb line of Fifth Street in State Street traveling about 35 miles per hour and approaching the intersection; that he slowed the bus slightly as he entered the intersection and proceeded through the intersection at about 20 miles per hour and when the front end of his bus was not more than one foot from the east curb line of State Street, the Ford Automobile, driven by Mr. Lowe struck the right side of the bus just to the rear of the right front wheel. Mr.

Gorman further testified that the Ford car, when he first observed it was a little to the right of the center of State Street; that he Gorman, continued to watch it until the collision occurred and just before the collision he pulled the bus slightly, about four feet to the left.

The only other occurrence witness who testified was Wm. R. Lowe. Mr. Lowe stated that he was 23 years of age and at the time of the collision, was employed as assistant to the manager of the Bond Loan Company and on the day of the occurrence the car involved in the collision belonged to his employer and he was driving it in connection with the business of the company with the knowledge and consent of the office manager of the company. Mr. Lowe further testified that the car was in excellent mechanical condition and that the brakes operated perfectly; that he was alone in the car and as he proceeded north on State Street there was no traffic ahead of him but that there were cars parked on both the west and east side of State Street; that the speed of his car was about 20 miles per hour and he was about 20 feet from the intersection when he first saw the bus with which he thereafter collided.

Mr. Lowe further testified that the bus at that time was 40 feet back from the intersection and traveling at a speed of approximately 40 miles per hour; that he continued to watch the bus and observed that it did not slacken its speed until the collision occurred; that he was traveling in the center of State Street and immediately applied his brakes but did not change the direction of his car and the collision occurred close to the center of the intersection, the right front corner of the bus striking the left front corner of the Ford car. This witness concluded: "I can't say how much time elapsed from the time I first saw the bus until the impact. It was approximately a second or somewhat less."

The plaintiff testified that she did not see the car driven by Mr. Lowe prior to the collision; that the first knowledge of the impact she had was when she heard the noise made by the two vehicles as they came together. As a result of the collision she was thrown from her seat into the aisle and became unconscious. She was assisted out of the bus and then to the hospital by a police car. As a result of the impact Mr. Gorman, the driver of the bus, was thrown from his seat toward the aisle and struck his head on a vertical post behind and to the right of the driver's seat which left him in a semi-conscious condition. The bus continued diagonally to the left on Fifth Street finally coming to rest when it struck a tree on the north side of Fifth Street some 75 feet east of the intersection. The Ford car when it stopped was headed south-east in the middle of the intersection. Mr. Lowe, its driver was not injured and he testified that he observed skid marks made by his car which began at the southerly curb line of Fifth Street and continued to the point of collision. Mr. Lowe further testified that he started to apply the brakes when he was approximately 20 feet south of the intersection.

Numerous photographs of the bus and car involved in the collision were offered and admitted in evidence and have been certified to this court with the record. We have examined these exhibits and read the abstract of the testimony. The record discloses that the bus involved in this collision was 28 feet 8 inches in length, nine feet six inches wide and weighed in excess of 19,000 pounds. At the time of the collision there were 32 seated passengers aboard this bus and several were standing in the aisle. The force of the collision loosened many seats and the manager of the bus line testified that the bus was so demolished that it could not be repaired.

The record discloses that Clarence Irvin was called as a witness by counsel for Peoria City Lines and testified that he was a police officer and arrived at the scene of the accident between ten and eleven o'clock on the morning of the occurrence and that he there saw Mr. Lowe and that he asked him what happened and Mr. Lowe replied that he was driving north on State Street and was unable to stop before impact with a bus going east on Fifth Street. On motion of counsel for the Bond Loan Company the answer was stricken and the jury instructed to disregard the answer as to the Loan Company. Counsel for plaintiff then inquired of the witness whether he had any further conversatinn with Mr. Lowe and the witness answered: "Well, I asked him if he had saw the bus and he said, "Not until it was too late, I just looked up and there it was'." Upon motion of the Bond Loan Company the answer as to it was stricken the court observing: "As far as Mr. Lowe, admissible; as far as the Bond Loan Company, not .

In complaining of the ruling of the trial court counsel for appellant state that this testimony was submitted to the jury as an admission against interest but that it was not contrary to any statement made by Mr. Lowe in his testimony. If, as counsel state, it was in accordance with the testimony of Mr. Lowe who testified prior to the time Mr. Ervin was called as a witness, it is difficult to understand how it was in any way prejudicial to appellant. Mr. Lowe was a defendant. It was a statement made by him and the court limited it only as to him and instructed the jury to disregard it as to the Bond Loan Company.

During the cross-examination of Mr. Lowe by counsel for Peoria City Lines he was asked if he recalled making the foregoing statements to Mr. Ervin. The witness answered: "No, I don't remeber telling him that, although I didn't see the bus until it was too late to avoid it". Thereupon counsel for the Peoria City Lines objected to

the answer as not responsive and the court stated: "The latter part from 'although' on will be stricken". Counsel for appellant complain of this ruling but the record does not disclose that counsel for appellant interposed any motion, made any objection or said anything at the time the ruling was made.

The photograph identified as Peoria City Lines Exhibit 10 is a colored photograph of the bus involved in this collision. It is insisted that no proper foundation was laid for its admission in evidence. We disagree. It was identified by George W. Sommers, the photographer who took it at the garage of the Peoria City Lines where the bus was taken after the accident. Mr. Sommers testified that the exhibit correctly and accurately represented the bus as it appeared there. Elgin B. Logsdon testified that he was the general manager of the Peoria City Lines and had been for seven years. He described the bus which he saw at the scene of the accident shortly after the collision occurred and before it had been moved and as abstracted by counsel for appellant this witness then continued: Defendant Peoria City Lines' Exhibit 10 is the damaged bus 519 , taken in the garage building, and shows the appearance of the bus when it was in the garage. It was exactly the same as it was at the scene of the accident. It also appeared exactly the same at the scene of the accident as it did at the garage. It shows the outside damage. This is a colored picture'.

We have also considered counsel's insistence that the court erred in permitting Mr. Sommers to refer in his evidence to certain areas appearing on Exhibits 9 and 11 which were not admitted in evidence. During his examination Mr. Sommers was shown Exhibit 10 and simply indicated on it portions of the bus which also appeared on exhibits

9 and 11. These exhibits 9 and 11, were not shown to the jury and the rulings of the trial court were in no sense prejudicial to appellant nor is there any merit in counsel's contention that Mr. Lowe was denied the right to explain answers he had previously made to questions propounded to him when his pre-trial deposition was taken. In our opinion the record discloses no reversible error in connection with the reception or rejection of evidence during the course of this trial.

It is next insisted that counsel for plaintiff exceeded the bounds of fair comment in his closing argument to the jury. What the abstract discloses is that counsel for the plaintiff said: "That is an attempt to hoodwink you ladies and gentlemen, an attempt to get you ladies and gentlemen to say that she should be deprived of her just deserts in this court room and the justice she is entitled to get. By some kind of an idiotic device, as far as what they are trying to tell you is concerned, they are trying to corrup the intelligence of these seven women and five men". Counsel objected and the court sustained the objection. Thereafter counsel for plaintiff stated: "Ladies and Gentlemen, it is just absolutely a crime to hoodwink you and try to lead you astray". Counsel for appellant interrupted stating: "We object to that as argumentative". The court said: "overruled". Counsel for plaintiff then concluded: "We feel we have proved both of them guilty of negligence, and it is common sense that the more people, the more parties you ask judgment against, the better security you have for that judgment". Counsel for appellant objected and the court sustained the objection.

Counsel for appellee has furnished us with an additional abstract of the record setting forth a part of the argument of counsel for appellant and a portion of the argument made by counsel for Peoria City Lines which preceded the objected portion of plaintiff's counsel's argument. Counsel had a right to reply to the preceding argument and to review the evidence and point out that opposite counsel was endeavoring to misconstrue the evidence and mislead the jury. The objectionable part of counsel's argument was disapproved by the trial court. Whether or not an objection should be sustained to statements made in arguments and whether remarks should be held to be error may depend upon the preceding argument of opposing counsel. (Walsh v. Chicago Railways Co., 303 Ill. 339, 351.)

It is insisted that instruction No. 9 and instruction No. 17 tendered by appellant should have been given. Instruction No. 9 told the jury that if they found from the evidence that the motor bus and the car which were involved in this collision were approaching the intersection of State and Fifth Streets at approximately the same time and that the car driven by Lowe was being driven at a reasonable rate of speed under the circumstances and that this car was in the intersection or so close to it that the bus could not enter safely and cross said intersection without colliding with the car, then the law is that the car had the right of way at the intersection. The trouble with this instruction is that it told the jury that the bus could not have the right of way unless it could enter safely and cross said intersection without colliding with the car. Instructions of this character are erroneous unless the relative distances and speeds of the vehicles involved are taken into consideration. (Walker v. Shea-Matson Trucking Company, 344 Ill. App. 466). The applicable statutory provisions are:

(a) the driver of a vehicle approaching an intersection shall yield

the right of way to a vehicle which has entered the intersection from a different highway and (b) when two vehicles enter an intersection from different highways at approximately the same time, the driver of the vehicle on the left shall yield the right of way to the vehicle on the right. (Ill. Rev. St. 1957, Chap. 95^{Art. 9}₂/sec. 165). Instruction No. 17 tendered by appellant was in the language of this statute but was incomplete since it did not contain the qualifications as to speeds and distances. (Bessette v. Loevy, 11 Ill. App. 2d 482, 486-7) Furthermore without objection the court gave on behalf of Peoria City Lines, a right of way instruction.

It is finally contended that the verdict is against the manifest weight of the evidence and is excessive. The question of negligence and whether one or both of the defendants were guilty as charged were questions of fact. The issues made by the pleadings were submitted to a jury under instructions as to the applicable law. The conduct of the respective drivers of the vehicles involved was described by their own testimony to which we have referred. There were no corroborating or impeaching evidence so far as the movement of the vehicles was concerned. The evidence found in this record sustains the jury's verdict. This court cannot say that the evidence warranted an opposite conclusion. (Romines v. Ill. Motor Freight 21 Ill. App. 2d 380)

As a result of the collision plaintiff was thrown from the seat which she occupied in the bus and rendered unconscious. She was taken to a hospital and there remained under the care of Dr. Sutton for fourteen days. She had severe contusions of the hip, lacerations on the right knee and left leg, a black eye and a lump on the left pelvis. She had a fractured rib and a vertebra displacement. At the time of the accident she was employed as personnel and credit manager of a retail

clothing shop. On October 31, 1956 she returned to work on a part time basis. In June, 1958 she returned to the hospital and remained there thirteen days. The evidence is that she was under the care of her physician from the time of the accident until the trial, at which time she wore a back brace and was suffering considerable pain and discomfort. Dr. Stuttle testified that her condition at the time of the trial was not normal, that her injuries were permanent and might require further treatment. Her medical and hospital bills aggregated \$1716.40. We are not inclined to interfere with the jury's determination of the amount of plaintiff's damage.

In view of our determination of this case it is unnecessary to refer to plaintiff's cross-appeal. Her counsel states that she is content with the judgment of the trial court and as we conclude there is no reversible error in this record the judgment of the circuit court of Georgia County is therefore affirmed.

McNeal, P. J., and Spivey, J., Judgment affirmed.
Concur.

WILLIAM LA MIE, a minor, by
EDWARD LA MIE, his father
and next friend,

APPEAL FROM SUPERIOR
COURT OF COOK COUNTY.

CHICAGO TRANSIT AUTHORITY,
a municipal corporation,

24 LA 50²¹

This is an appeal from a judgment on a verdict of not guilty in a personal injury case. The accident occurred on November 1, 1951, at about 7:30 P.M., near the intersection of Pulaski Road and North Avenue in Chicago. A bus operated by defendant came in contact with a bicycle being ridden by plaintiff, then twelve years old. No error is charged with respect to the ruling on the evidence or that the verdict is contrary to the manifest weight of the evidence. The only questions raised on this appeal relate to errors in instructions given by the court on its own account and at the instance of defendant. It is therefore unnecessary to relate the facts in any detail, but we will refer to them as we discuss the errors relating to the instructions.

Sixteen instructions were given on behalf of defendant, and plaintiff assigns errors with respect to seven of them. He also assigns errors with respect to instruction No. 2 prepared by the court outlining the issues in the case. This is indeed a high percentage of

error, if it be such, for an experienced and competent judge and lawyers who are specially skilled in personal injury work. Moreover, seventy-one pages of brief in chief and forty pages of reply brief are submitted by plaintiff's counsel in the consideration of what are in the main well established formal instructions. The case cries loudly for some urgent action on the matter of standardizing instructions, on which a committee of judges and lawyers is now working.

Instruction No. 2 sets forth concisely the charges of negligence on which plaintiff based his action -- failure to exercise reasonable care in the operation of the bus; failure to keep proper and sufficient lookout for plaintiff; and failure to keep the vehicle under sufficient control so as to be able to stop readily or slacken speed. The instruction then advises the jury that defendant denies it is guilty of the charges, denies that the bus ran into the bicycle, and states that defendant's claim is that plaintiff caused his bicycle to run into the side of the bus. Plaintiff complains that this singled out one issue in the case. We are convinced that was the dominant issue upon which the case was presented to the jury by both counsel.

Issues are made by pleadings, statements of counsel, evidence, rulings of the court, instructions and arguments. An issue made by the pleadings may have no evidence to support it, or counsel may waive it in his statement or argument. As an example of how the

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instant case turns on the issue outlined in this instruction, plaintiff's brief starts with the statement that the boy while on a bicycle was struck by the bus, and again, that the bus came alongside him and swerved into him, and again, that the bus cut into him, and again, that the boy "felt a sudden bump in the rear," and other such instances. In his argument to the jury plaintiff's counsel said: "...the bus came abreast of him [plaintiff] and the front of the bus came by him and he could see it on his left and he kept going straight and as the front cleared him, just about the doors, he felt an impact in the back and the bus swerved into him and turned to the right and he felt the impact in the back...." And again: "The young man says he was driving straight. He says that he felt the bus swerve into him to the right." Counsel was there stating his client's case. An instruction cannot be complained of which puts the case to the jury on the same basis as counsel did.

It is true, as counsel contends, that under certain circumstances it is improper to make an issue of who struck whom first, but in this case plaintiff claims he was ahead of the bus, that it caught up to him, and that it then swerved and struck him. Defendant claims that plaintiff was somewhere in back of the bus, that the bus continued a straight course ahead, and that plaintiff drove his bicycle into the side of the bus near the rear of it. The heart of the case was thus

accurately presented by the court in the instruction.

Counsel has argued that only the ultimate issues, that is, negligence and contributory negligence, should be set forth in this kind of instruction. The instruction is intended to explain to the jury what questions in the case were being presented to them for decision. This the court did in a manner fair, concise and plain.

Counsel also complains because the element of proximate cause was omitted from the instruction. The element of proximate cause was set forth three separate times in instruction No. 13, once in instruction No. 8, once in instruction No. 11, and twice in instruction No. 15, where the word "proximately" is defined. It was thus fully covered in other instructions. Moreover, by instruction No. 1, the court told the jury that they were to consider the instructions as a whole and not to disregard any one of them.

The next instruction complained of, No. 8, is as follows:

"If you find from the evidence that defendant's trolley bus was being driven in a northerly direction on Crawford Avenue north of North Avenue with ordinary care, and if you further believe from the evidence that the operator of said bus drove it straight north after passing North Avenue and did not turn or swerve the bus to its right at or immediately before the collision in question, and that the conduct on the part of the operator in so driving was not negligence, and if you further believe from the evidence that the plaintiff, William La Mie, rode his bicycle into or in such a manner that it collided with the right rear side

of the bus in question, and that such action on the part of plaintiff, William La Mie, taking into consideration his age, experience, intelligence and capacity, was negligence which proximately contributed to cause the collision and injuries in question, then you should return a verdict finding the defendant not guilty."

It should be noted that this instruction combines freedom from negligence on the part of defendant and freedom from contributory negligence on the part of plaintiff as necessary to support a not guilty verdict. In that respect it was favorable to plaintiff. However, that would not excuse error, if it were there. It is charged that as in instruction No. 2, this instruction erroneously isolates the single fact that the bus drove straight north and did not turn or swerve. We have disposed of this argument in our consideration of instruction No. 2. Plaintiff here submits hypothetical questions as to whether the bus driver could not, by allowing only a foot or two between the right side of the bus and the bicyclist, have created a perilous situation "whereby that bicyclist 'rode his bicycle into or in such a manner that it collided with the right rear side of the bus in question.'" Perhaps such a situation could have been created, but the fact still remains that the issue as presented to the jury by counsel and by plaintiff himself while on the witness stand was whether the bus swerved into him or he drove his bicycle into the bus.

The next instruction complained of is No. 13. That instruction starts with the sentence: "The happening of an accident does not raise a presumption of negligence on behalf of the defendant." That one sentence standing alone has been held to be improper. Minnis v. Friend, 360 Ill. 328, 337-38, 196 N.E.191, 195 (1935); Krawitz v. Levinstein, 320 Ill. App. 618, 624, 52 N.E.2d 60, 62-63 (1943); McLaren v. Byrd, Inc., 296 Ill. App. 345, 15 N.E.2d 993 (1938); Walsh v. Moore, 244 Ill. App. 458 (1927). However, the instruction goes on to amplify that statement. It sets forth the conditions on which recovery may be had, to-wit: that the defendant was guilty of negligence as charged; that the negligence was the direct proximate cause of the occurrence; that plaintiff was required to exercise such care as an ordinarily prudent boy of his age should exercise; and that as a proximate result of the negligence, plaintiff was injured. The instruction as a whole was substantially correct, and in any event was not reversible error. Defendant argues with respect to the meaning of the term "accident" that as used in this instruction it merely means "a happening; an incident; an occurrence or event." We think this is sound. Other objections we find to be trivial and unsound.

The next instruction to be considered is No. 11. That instruction is as follows:

"If you believe from the evidence that neither the plaintiff, William La Mie, nor the defendant's

bus operator were negligent, or if you believe from the evidence that the plaintiff, William La Mie, was negligent, taking into consideration his age, experience, intelligence and capacity, and that the defendant's operator was not negligent, or if you believe from the evidence that both the plaintiff, William La Mie, and the defendant's operator were guilty of negligence which proximately caused the collision in question, then in any of these cases you should find the defendant, Chicago Transit Authority, not guilty.

"You may not compare the negligence of the plaintiff, if any, and that of the defendant, if any, to determine which was guilty of the greater degree of negligence."

Plaintiff contends that that instruction was error because negligence could have been predicated on the failure of the bus company to provide mirrors outside and on the right side of the bus--"that there was no mirror system on the outside of the bus on the right side where the collision occurred." There was no evidence that such a device was practical for this type of vehicle. Failure to adopt and use a mechanical device cannot be made negligence merely by assertion. There must be some proof of utility and availability. Complaint is made of the reference to defendant's driver. The charges of negligence were all against defendant as an entity, and the jurors by other instructions could not fail to discern that a reference to the bus driver was to him as the agent of defendant. Plaintiff's instruction No. 20 specifically told the jurors that the driver was the agent of defendant. We see no reversible error in the instruction under consideration.

Instruction No. 4 is next challenged by plaintiff.

That instruction reads as follows:

"In considering this case and in passing upon your verdict, you are not required to set aside your own common observation and experience as men and women in the affairs of life, but, on the other hand, you have the right, upon consideration of all the evidence in this case, in the light of your own common observation and experience as men and women in the affairs of life, to say where the truth lies upon any issue in this case."

It is in substance a stock instruction and has been approved. Kankakee Park Dist. v. Heidenreich, 328 Ill. 198, 205, 159 N.E. 289, 292-293 (1927); Steinberg v. Northern Illinois Tel. Co., 260 Ill. App. 538, 543 (1931). However, for some reason known to defendant alone, it undertook to gild the lily and made one or two changes, the purpose of which we do not see. It added an injunction to the jury that it is for them "to say where the truth lies upon any issue in this case." The addition was harmless. Plaintiff cites as authority for his objection to that instruction Steinberg v. Northern Illinois Tel. Co., supra. In that case the court told the jury that in determining the issues they should be governed by the instructions and by the evidence "in the light of their own observation as men of ordinary affairs of life." The reviewing court said it was quite proper for the jury to determine the facts in such light, but they were not authorized to interpret the instructions, and the wrong lay in the inclusion of the word "instructions." That vice is not



in this instruction, which is confined to the evidence. In other cases cited by plaintiff, Johnson v. Pendergast, 308 Ill. 255, 265, 139 N.E. 407, 410 (1923); and Hinkley v. International Harvester Co., 230 Ill. App. 379, 381 (1923), the instructions were very different from the one here in question.

Instruction No. 6 is a substantially correct instruction. West Chicago Street R.R. v. Estep, 162 Ill. 130, 132, 44 N.E. 404 (1896); West Chicago Street R.R. v. Nash, 166 Ill. 528, 529, 46 N.E. 1082 (1897). One part of the instruction complained of is as follows:

"While the law permits the plaintiff in this case to testify in his own behalf, nevertheless, the jury have the right, in weighing the evidence to determine how much credence is to be given to it and to take into consideration that he is the plaintiff and interested in the result of the suit."

The objection to that instruction is that the article "the" qualifying "evidence" should have been "his." There is so little merit to this point, we do not feel warranted in spending any time on it. The identical verbiage was approved in Lauth v. Chicago Union Traction Co., 244 Ill. 244, 253 (1910). The balance of the instruction relates to sympathy and prejudice, and is substantially correct.

Instruction No. 15, next challenged by plaintiff, has been approved. Von Stein v. Chicago City Ry., 166 Ill. App. 477, 484 (1911); Schmidt v. Anderson, 301 Ill. App. 28, 48, 21 N.E.2d 825 (1939). Plaintiff argues that this instruction defining contributory negligence opens

the door "to some act done by the plaintiff long prior to the occurrence," because it does not confine contributory negligence to that occurring immediately prior to the accident. The fifth sentence of that instruction reads: "Proximately, when used in this connection means closely connected with the injury in order of events, and so connected with the injury that but for the contributory negligence the injury would not have happened." That is adequate.

In Hulke v. International Mfg. Co., 14 Ill. App. 2d 5, 52, 142 N.E.2d 717, 742 (1957), the court said that analytical criticism was not the fair or just mode of examining instructions, and then quoted from Reivitz v. Chicago Rapid Transit Co., 327 Ill. 207, 213, 158 N.E. 380, 382-83 (1927):

"The test, then, is not what meaning the ingenuity of counsel can at leisure attribute to the instructions, but how and in what sense, under the evidence before them and the circumstances of the trial, ordinary men acting as jurors will understand the instructions."

The court considered that the proper approach was not to determine whether each individual instruction was mechanically correct, but whether on the whole they were sufficiently clear so as not to mislead the jury. The instructions in the instant case meet these requirements.

It is conceded that there was ample evidence in this case to go to the jury and to support the verdict of not guilty. No point is made on any of the rulings on the evidence, on the argument, or on the pleadings. Examining the case as a



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whole, we feel that it was well tried by court and lawyers and a fair verdict rendered.

Judgment affirmed.

Dempsey, P. J., and McCormick, J., concur.

Abstract only.

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT - FIRST DIVISION
February Term, 1960

WILLIAM B. STEIN,)	
)	
Plaintiff-Appellee	)	Appeal from the
)	
vs	)	Circuit Court of
)	
REICHERT CHEVROLET and	)	McHenry County.
BUICK SALES, INC.,)	
)	
Defendant-Appellant.	)	21

DOVE, J.

The complaint and motion for a temporary injunction in this case were filed in the circuit court of McHenry County on September 23, 1959. Upon an ex parte hearing the court entered an order directing the clerk to issue a writ of injunction restraining General Motors Acceptance Corporation and Reichert Chevrolet and Buick Sales, Inc. from selling, transferring or otherwise disposing of a described Chevrolet sedan and also from attempting to collect the balance of an installment contract given by the plaintiff in connection with the purchase of said automobile. The order recited that plaintiff would be unduly prejudicial if the writ was not issued immediately and without notice and directed that the writ issue without bond. The writ issued and was served on Reichert Chevrolet and Buick Sales, Inc. but was not served on the other defendant, General Motors Acceptance Corporation.

[illegible]

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1. *Abstract* 2. *Introduction* 3. *Methods* 4. *Results* 5. *Discussion* 6. *Conclusion*

The Practice Act provides that an appeal may be taken to the Appellate Court from an interlocutory order granting an injunction, provided that the appeal is perfected in the trial court and the record is filed in the Appellate Court within 30 days from the entry of the interlocutory order. No notice of appeal need be filed and the appeal is perfected by the filing of a bond in the trial court approved by the clerk or judge to secure the costs in the Appellate Court. (Ill. Rev. St. 1959 Chap. 110, sec. 78 (1)).

The act also provides that if an interlocutory order or decree is entered on an ex parte application, the party intending to take an appeal therefrom shall first present, on notice, a motion to the trial court to vacate the order or decree. Appeal may be taken either if the motion is denied or if the court does not act thereon within 7 days after its presentation. (Ill. Rev. St. 1959, Chap. 110 sec. 78 (2)).

It is also provided that the force and effect of the interlocutory order or decree and the proceedings in the trial court shall not be stayed during the pendency of the appeal except by order of the Appellate Court or by a judge thereof in vacation. Upon the filing of the record in the Appellate Court the appeal shall there be at once docketed, and shall take precedence over other cases (Ill. Rev. St. 1959 Chap. 110 sec. 78 (3) (4)).

Supreme Court rule 31 provides that the presentation of appeals from interlocutory orders is governed by rules of the Appellate Courts and our Rule 23 outlines the procedure to be followed in this court. Our rule is substantially in the language of the Practice Act and provides that where an interlocutory order is entered on ex parte application, the party proposing to take an appeal therefrom shall first present, on notice, a motion to vacate the order to the trial court entering such order. An appeal may be taken if the motion is denied, or if the court does not act thereon within 7 days after its presentation.

The record in this case discloses that on September 26, 1959 counsel for the defendant mailed to counsel for the plaintiff a notice to the effect that he would appear before Judge M. N. Carroll at his court room in the Henry County Court House and move the court to grant the motion, a copy of which was attached to the notice. This notice and the accompanying motion and affidavit were filed in the office of the Circuit Clerk on November 6, 1959. This motion requested the dissolution of the injunction and the dismissal of the complaint for the reasons stated in the affidavit and because of the insufficiency of the complaint. The affidavit attached to the motion was executed by counsel for defendant and stated upon information and belief, that defendant Reichert Chevrolet and Buick, ^{Sales Inc.} did not repossess this car but averred it was repossessed by General Motors Acceptance Corporation and that the Reichert Company paid to General Motors Acceptance Corporation the cost of the car and that by so doing, affiant concluded, that the car is the property of Reichert Chevrolet and Buick, ^{Sales Inc.} It was also stated in this affidavit that the automobile, the subject matter of this litigation, was depreciating daily/^{in value} and concluded that if the injunction is not dissolved immediately defendant will suffer irreparable damage unless a bond indemnifying defendant is posted by plaintiff.

While this motion and affidavit were not filed until November 6, 1959 the copy included in the record have these words thereon following the signature of counsel, viz: Certified as true and correct copy of motion and affidavit as presented October 1, 1959. M. N. Carroll, judge. On this day, October 1, 1959, Judge Carroll entered an order directing plaintiff to post a \$1,000.00 bond which was done.

The following day, October 2, 1959 the court entered the following order in this cause, viz:

'This cause coming on to be heard on motion of Harold McKenney, attorney for defendant, it is ordered, adjudged and decreed by the court that plaintiff to this cause be and he is hereby given time to answer motion and cause placed on contested motion call as per written order entered herein, to-wit: 'On motion of Harold McKenney, attorney for defendant to file his motion to dismiss temporary injunction: It is hereby ordered leave be and hereby is given plaintiff to file his answer or other pleadings to said motion within ten days; It is further ordered said motion and answer thereto be set on the next convenient contested motion calendar.'

Following the entry of this order the defendant filed, on October 13, 1959 its answer and counterclaim. On November 3, 1959 defendant filed its notice of appeal together with proof of service on counsel for plaintiff. On the same day defendant filed a bond in the usual and customary form of an appeal bond/conditioned that defendant would prosecute the appeal and pay the amount of said judgment costs, interest and damages rendered against it in case the injunction shall be affirmed in said Appellate Court.

On November 6, 1959 this bond was approved by the court and on the same day the record on appeal was filed in this court. The abstract of the record and appellant's brief were filed on November 13, 1959. Counsel for appellee entered the appearance of appellee and moved for an extension of time to file his brief and by stipulation of the parties that motion was granted and the time extended to and including November 25, 1959. No brief and argument were ever filed by appellee and on February 11, 1960 the case was reached on the call of the docket and submitted.

In their brief and argument counsel for appellant state that "due to the exigencies of an overcrowded docket Judge Carroll has not been able to hear the motion to dissolve which was presented to him on October 1, 1959 up to this time and since the defendant feels that the action of the chancellor in granting the interlocutory order of September 23, 1959 restraining the defendant from selling or otherwise disposing of the automobile in question was reversible error, which is currently acting greatly to the detriment of defendant, it now prosecutes this appeal .

When the motion to dissolve the injunction was presented to the court it was accompanied by an affidavit which stated that the automobile which was the subject matter of the litigation was depreciating daily in value and unless the injunction was dissolved immediately defendant would suffer immediate and irreparable damage through such depreciation unless a bond was posted by the plaintiff. The record does not disclose whether counsel for either of the parties were in court on October 1, 1959 but it does show that on that day the court entered an order directing plaintiff to post a \$1,000.00 bond.

The order which was entered the following day, October 2, 1959 was signed by Judge Carroll. It reads: "A motion of Harold A. Jensen, attorney for defendant, to file his motion to ~~dismiss~~ temporary injunction; It is hereby ordered leave be and hereby is given plaintiff to file his answer or other pleadings to said motion within ten days; it is further ordered said motion and answer thereto be set on the next convenient contested motion calendar'.

When this order was entered the motion of defendant to dissolve the injunction had not been filed with the clerk but had been presented to Judge Carroll. If defendant or his counsel ever desired this motion to be heard by the court the record does not disclose, nor does the record disclose that the plaintiff ever moved or requested leave to file an answer or other pleadings to said motion. The order granting plaintiff this leave and the clerk's record state that the order was entered on motion of Harold McKinney, attorney for defendant.

The Practice Act makes it a condition precedent to the right of appeal not only that defendant present, on notice, a motion to the trial court to vacate the ex parte order granting a temporary injunction but that such motion must either be denied or not acted on within 7 days after its presentation. The motion by defendant in this case was presented to Judge Carroll and he acted thereon the following day. The order he entered neither granted or denied defendant's motion to vacate. The order that was entered, according to the record, was upon defendant's motion. No request or motion for such an order was made by plaintiff and if not entered upon defendant's motion it was acquiesced in by defendant and its counsel as satisfied therewith, otherwise the record would have indicated an objection thereto. Had defendant desired a hearing upon its motion to vacate the ex parte order counsel certainly would have pressed for such a hearing.

In Grossman v. Grossman, 30 Ill. App. 307, a temporary injunction was issued ex parte on October 9, 1939, and a further restraining order issued on October 20, 1939. On October 25, 1939, defendant gave notice to plaintiff's counsel and filed his motion to dissolve the injunction. In accordance with the notice counsel for



defendant appeared before the court the next day and requested immediate disposition of the motion. The court declined this request and continued the hearing on the motion to November 24, 1939 and defendant appealed. In the course of its opinion the Appellate Court stated that formerly it was the common practice for defendants in cases where appealable interlocutory orders were entered on such, to appeal to the Appellate Court without giving the trial court an opportunity to pass upon the points they were raising in their motion to dissolve; that the procedure now required a defendant to present his motion to the trial court before he is permitted to appeal; that if the trial court rules adversely or fails to rule within seven days after the motion is presented, then he may appeal. The opinion then continues. (p. 51.) In the instant case the trial court did not rule within seven days from the time the motion was presented. Counsel for plaintiff asserts that the reason the trial court did not decide the motion within seven days was because the court was occupied with other litigation. Rule 51 permits an appeal where the motion is not decided within seven days, and does not contain an exception to the effect that the appeal may not be prosecuted if the press of litigation be so great that the court cannot rule on the motion. Clearly, therefore, the defendant had a right to appeal when the court did not rule on his motion within seven days".

The record in the instant case is clearly distinguishable from the record in the Crossman case, supra. There counsel for defendant filed in the court that issued the injunction his motion to dissolve on October 25, 1939 and gave notice to plaintiff thereof and that he would present the motion to the court the next day. He did so and requested immediate disposition of the motion. The court declined the

request and of its own motion continued the hearing for a month. In the instant case notice was given by counsel for defendant that he would appear before the court on October 1, 1959 and move the court to dissolve the injunction and in support of that motion ^{attached} ~~to present~~ his affidavit which stated that defendant would suffer irreparable injury unless a bond indemnifying the defendant was posted. The court ordered plaintiff to post a bond and that order was complied with. The court did grant defendant the relief he asks and that was the only order the court made on the day defendant's motion was noticed for hearing. Judge Carroll certifies that the motion was presented October 1, 1959 but it does not appear whether it was presented to him in court and the record shows that both the notice to opposite counsel and the motion itself were not filed in the clerk's office until November 2, 1959. The record does not show that counsel for defendant appeared in court on either October 1, 1959 or October 2, 1959 and it does not show counsel ever requested ^{the portion of} disposition of this motion requesting a dissolution of the injunction or that the court ever declined to hear it. The only order entered in connection therewith appears to have been entered on defendant's motion and defendant is in no position to object to ^{that order} / for the first time in this court. The only reasonable conclusion that can be arrived at from this entire record is that the failure of the court to rule on defendant's motion to dissolve was because defendant never requested its disposition but acquiesced in the order which the court entered on October 2, 1959.

In *Millikin Trust Co. v. Morris*, 345 Ill. App. 105 an appeal to the Appellate Court of the Third District from an interlocutory order granting a temporary injunction was dismissed where it appeared no cost bond had been filed by appellant as provided by the Practice Act. In the instant case no bond for costs was filed by appellant. There was filed, however, on November 3, 1959 an appeal bond which was approved by ^{on November 6, 1959} the court/and which we are inclined to think was sufficient to perfect this

appeal. No notice of appeal such as defendant filed in the trial court is required in a proceeding of this character but the appeal is perfected when a bond, not in any fixed amount, but to secure costs in the appellate Court is approved by the clerk or judge and filed within the time prescribed by the practice act. It might also be noted, that no notice of the filing of the record on appeal was given appellee by appellant required by rule 1 (a) (f) of this court.

In our opinion the record in this case did not, at the time appellant sought to perfect an appeal authorizing an appeal to this court and the appeal therefore will be dismissed.

Appeal dismissed.

McNeal P. J. & Spivey J. Concur

McNeal, P.J. and Spivey J. Concur

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In the
APPELLATE COURT OF ILLINOIS
Fourth District
October Term, 1959

Lawrence Patterson, et al.,)	
)	
Plaintiff-Appellant,	)	Appeal from the
)	
vs.	)	Circuit Court of
)	
A.J. Byrne;	)	Franklin County, Illinois
)	
Defendant-Appellee.)	

Honorable Randall H. Quindry, Presiding Judge.

Scheineman, P. J.

The plaintiff, a child of seven, while visiting at a neighbor's house, was injured when he attempted to cross the driveway next to the house, just as the owner was backing his car out of the drive. The complaint charged defendant with negligence only. A motion for a directed verdict at the close of plaintiff's evidence was allowed and judgment entered for defendant.

The defendant was called under Section 60 of the Practice Act, so that his version of the occurrence, as well as plaintiff's, is available.

The arrangement of the premises of defendant is that there is a front porch; a driveway enters from the front and proceeds along the side of the house to a carport in the rear.

The house is 46 feet long, but the carport is attached to it, so that the distance from the front corner of the house to the carport is 32 feet. On the other side of the drive was a churchyard in which children sometimes played.

The defendant returned home from work in the afternoon, when plaintiff was playing on the front porch with another child of his age, a member of defendant's household, but the defendant did not know this. The children played together often, sometimes at defendant's and sometimes at plaintiff's residence. The defendant did not go through the house, as he was informed of a telephone call that he should pick up his lawn mower which had been repaired. He decided to go at once because a storm was brewing, so he proceeded to back out of the driveway.

The defendant stated that, as he looked back he saw nothing except that there was a vehicle parked at the curb across the street which he would have to avoid. About this time the plaintiff decided to go home, because of the approaching storm, so he left the porch and sought to cross the driveway, just as the defendant's car reached that point. The plaintiff described his own movement as "trotting". He was knocked down and had one leg run over. The defendant immediately took him to a hospital.

From the foregoing, it is apparent that the plaintiff had the status of a social guest, or licensee, so that the defendant's duty was not to wilfully or wantonly injure him, unless the circumstances or conditions required some higher standard of conduct. A higher degree of care is sometimes required. Counsel for plaintiff call this the "humanitarian" rule, and appear to contend that it should be applied in all cases where a child is on another's property as a licensee, so that a duty to use reasonable care exists as to any child licensee, regardless of the

The first part of the document discusses the importance of maintaining accurate records of all transactions. It emphasizes that every entry must be supported by proper documentation, such as receipts or invoices. This ensures transparency and allows for easy verification of the data.

Furthermore, the document highlights the need for regular audits. By conducting periodic reviews, any discrepancies or errors can be identified and corrected promptly. This proactive approach helps in maintaining the integrity of the financial system and prevents potential issues from escalating.

In addition, the document stresses the importance of clear communication between all parties involved. Regular meetings and reports should be used to keep everyone informed about the current status and any changes that may occur. This collaborative effort is essential for the successful operation of the organization.

The second part of the document provides a detailed overview of the current financial performance. It includes a summary of the revenue generated, the expenses incurred, and the resulting profit or loss. This information is presented in a clear and concise manner, making it easy for stakeholders to understand the overall financial health.

Key findings from the analysis include a steady increase in revenue over the past quarter, which is attributed to the successful launch of new products and services. However, there is a notable increase in operating expenses, primarily due to higher costs for raw materials and labor. Despite these challenges, the overall profit margin remains stable, indicating effective cost management.

Looking ahead, the document outlines several strategic initiatives aimed at improving financial performance. These include exploring new market opportunities, optimizing the supply chain, and investing in research and development to create innovative products. The goal is to achieve sustainable growth and maintain a competitive edge in the market.

In conclusion, the document provides a comprehensive overview of the organization's financial and operational status. It identifies key areas for improvement and outlines a clear path forward. By following the recommended strategies, the organization is well-positioned to achieve its long-term goals and ensure a bright future.

of the circumstances.

It is true that injuries to children have caused the courts much difficulty. It is a matter of common knowledge that children are inexperienced and lack understanding of dangers, and fail to appreciate the hazards of what they do, so that, the law properly expects some precautions to be taken in their behalf. On the other hand, the courts do not wish to hamper or burden unduly the rights of ownership, possession and use of property. The resident has a right to make his home and surroundings attractive, convenient and comfortable. Yet, a tree, a fence or even a sun dial can be a place of danger to a child, so that the precautions for the safety of a child must be weighed against the imposition of an unreasonable degree of liability for the usual and ordinary conditions of property.

Various attempts to arrive at a reasonable principle of law in these cases have been made. The attractive nuisance theory has been used extensively in this state, although it is sometimes difficult of application. The Illinois Supreme Court appears to favor an approach to the problem based on the factors of knowledge and foreseeability, as indicated in the cases hereafter cited.

In *Wagner v. Kepler*, 411 Ill. 368, the court said: "While it is generally true, as defendant contends, that infants have no greater rights to go upon the land of others than adults, and their minority imposes no duty upon landowners to expect them or prepare for their safety, recognized exceptions exist where the landowner maintains an attractive nuisance upon the premises, or, even in the absence of a dangerous attraction, where the owner knows that small children customarily play on the property. In the latter situation if he knows or should know, that young

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children habitually frequent the vicinity of a defective structure or a dangerous agency existing on the land, which is likely to cause injury to them because they, by reason of their immaturity, are incapable of discovering the danger or appreciating the risk involved, and where the expense or inconvenience to the owner in remedying the condition is slight compared to the risk to the children, the duty devolves upon the owner to exercise due care to remedy the condition or otherwise protect the children from injury resulting from it."

In Kahn v. James Burion Co., 5 Ill. 2d 602, the court said: "The creator of certain conditions dangerous and hazardous to children because of their immature appreciation of such dangers and hazards must be held to a certain standard of conduct for the protection of such children. Account must be taken of the cost and burden of taking precautionary measures, * * * Every person owes to all others owes to all others a duty to exercise ordinary care to guard against injury which may naturally flow as a reasonably probable and foreseeable consequence of his act. The test is whether the lumber company in the exercise of ordinary care could reasonably have anticipated the likelihood that children would climb onto the lumber and would be injured if it were not securely piled."

It should be noted, that in the case last cited the court was not saying that liability would ensue merely because a child climbed onto the lumber pile and fell off, but only if the injury was caused by the method of piling, and the court further held it was a question for the jury whether the defendant had so piled the lumber as to create an unreasonable danger to children.

Children find an infinite variety of ways to get hurt

and it is our opinion that a property owner is not and cannot logically be required to guard against every possibility of injury. As shown by the cited cases, the rule is stated in various ways that resulting injury must be a reasonable probability, be foreseeable, or a likelihood to be reasonably anticipated. It is an application to modern conditions of the similar rule that has long existed in cases involving railroad property: to a trespasser or licensee the only duty under ordinary conditions is not to wilfully and wantonly injure him, but there is a duty to use ordinary care to avoid injury to him after his presence on the premises in a place of danger has been discovered. *Briney v. Ill. Cent. R.R. Co.*, 401 Ill. 172.

This is a duty owed to all persons regardless of age. The only difference as to a child is that it has not the capacity to perceive and avoid needless risk, therefore reasonable precautions, not inconsistent with normal use of property, must be taken where their presence is known or anticipated, and a danger exists which they are not capable of understanding.

The plaintiff argues that a better doctrine is one used by some courts, in making a distinction between active and passive negligence, citing *Moore v. Ohio Oil Co.*, 241 Ill. App. 388 as an example of approval in this state. That case involved a defendant who had stretched a wire across a passage on which he had permitted use by others for a long time. The court held such an affirmative act created a liability to one who was thereby injured while exercising due care. Obviously the defendant had acted anticipating the coming of trespassers or licensees, and the ancient common law rule of liability in a case of mantraps or spring guns would apply. The rules we have cited sufficiently

cover that situation, since the tripping of a passerby was foreseeable and to be anticipated.

Moreover, we deem it beyond reason to assert so common and necessary an act as backing a car out of a drive is to be called active negligence in itself. So far as his action is concerned, the defendant in this case did look back and saw nothing, and it is undisputed that there was no child in sight at the time, and none could be seen until the moment defendant cleared the corner of the house. We would add that, in states where the distinction is supposedly applied, there is difficulty in making a clear rule as to what is active and what is passive negligence, resulting in much confusion. See note in 156 ALR 1228. We believe the Illinois rule is better which retains the wilful and wanton rule, except where injury is reasonably foreseeable, to be anticipated under the circumstances.

We deem these the reasonable rules of law in this state, and therefore apply them to the case at bar. Here the condition that existed was simply an ordinary driveway on private property, which cannot be called an unreasonable danger to children, and all that defendant was doing was backing out to the street, a maneuver that occurs millions of times daily without causing injury. Injury is not probable, although it certainly is possible, and has occurred. Indeed, even a parent may accidentally back into his own child who is a regular habitant of the premises.

If the child had been in view reasonable care would be required to avoid injury. But the evidence is undisputed that as defendant looked back, there was nothing visible to have any bearing on his action except a vehicle across the street. As a matter of law his backing out of his drive was not a wilful and wanton act, and there was no condition or fact known to him that

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would create the duty to use reasonable care toward a licensee.
The judgment on directed verdict for the defendant was correct
and is affirmed.

Judgment Affirmed.

Culbertson and Hoffman, JJ., concur.

Publish Abstract Only.

FILED

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT - FIRST DIVISION
October Term, 1959

HUGH K. FUNDERBURG,

Plaintiff-Appellant,

vs.

FREDERICK W. SHAPPERT, JR.

and VERONA E. SHAPPERT,

Defendants-Appellees.

Appeal from the
Circuit Court of
Boone County.

DOVE, J.

On January 27, 1958 Hugh K. Funderburg filed his complaint in the circuit court of Boone County against Frederick W. Shappert Jr. and Verona M. Shappert praying that a partnership composed of himself and the defendants be dissolved, the assets sold, the debts paid and pending its liquidation, a receiver be appointed.

The complaint alleged that the partnership business was conducted under the name of Frank T. Moran and Company and that the partnership had acquired valuable assets, operates on leased premises and its business consists principally of printing and publishing the Belvidere Daily Republican, a daily newspaper which enjoys a wide circulation and which has been published for more than forty years.

1. The first part of the document is a letter from the President of the United States to the Congress, dated January 3, 1862.

2. The second part is a report from the Secretary of the Treasury, dated January 10, 1862.

3. The third part is a report from the Secretary of the Interior, dated January 10, 1862.

4. The fourth part is a report from the Secretary of the Navy, dated January 10, 1862.

5. The fifth part is a report from the Secretary of the War, dated January 10, 1862.

6. The sixth part is a report from the Secretary of the State, dated January 10, 1862.

The complaint further alleged that for many years prior to his death in 1949, Frank T. Moran managed and controlled the business of the partnership; that he and his wife, Edna G. Moran owned the business and were the sole members of the partnership until December 10, 1948, at which time Frank T. Moran assigned his interest in the company to his daughters, Berneita Martin and Verona Shappert; that thereafter and until his death on August 23, 1949, he continued to manage the company but upon his death Frederick W. Shappert, husband of Verona Shappert became the general manager of the company and has so continued and was its manager at the time the complaint was filed. It was then alleged that in the latter part of November 1957 Edna G. Moran transferred her undivided one-half interest in the partnership to her son-in-law, Frederick W. Shappert, and on December 7, 1957 Berneita Martin transferred her one-fourth interest therein to the plaintiff.

The complaint then alleged that the plaintiff and Shappert have substantial personal interests in various businesses in and around Belvidere; that as a result of plaintiff's acquisition of an interest in the partnership a personal bitterness has arisen between the plaintiff and Frederick W. Shappert; that Shappert personally controls the printing and publication of the newspaper and plaintiff fears that because of this bitterness Shappert will publish in the newspaper derogatory matters concerning the plaintiff which would adversely effect his reputation and business interests. It is then alleged that plaintiff has requested of Frederick W. Shappert the right to examine the books of the company but that this right had been denied him and it is then averred that Shappert, in order to prevent plaintiff from examining some of the securities of the company, had removed them from their accustomed repository and secreted them.

In addition to praying for the dissolution of the partnership and the appointment of a receiver, the complaint sought an injunction pending the final disposition of the case restraining the defendants from

selling, assigning, concealing or hypothecating any of the assets of the partnership and also sought an accounting praying that after the payment of all the debts and obligations of the partnership that one-half of the balance of the assets be distributed to the defendant Frederick W. Shappert Jr., one-fourth to Verona H. Shappert and one-fourth to the plaintiff.

The defendants filed an answer, an affirmative defense and a counterclaim. So far as necessary for a determination of the issues presented by this appeal it need only be noted that the pleadings of the defendants admitted that on December 7, 1957 Berneita Martin transferred her one-quarter interest in the partnership to the plaintiff. By their answer, affirmative defense and counterclaim, however, the defendants set forth matters, which they insist disclose that, at the time plaintiff acquired the interest of Mrs. Martin in the partnership a confidential and fiduciary relationship existed between Funderburg and Shappert and that plaintiff acquired Mrs. Martin's interest in the partnership in violation of the trust and confidence reposed by Shappert in Funderburg as a result of that relationship and that, therefore a resulting trust arose in favor of Shappert and he is entitled to the relief demanded by his counterclaim.

The prayer of the counterclaim was that plaintiff's suit be dismissed; that the court decree that plaintiff holds title to the one-fourth interest in the partnership which he purchased from Berneita Martin as a constructive trustee for the benefit of one or both of the counterclaimants and that upon the payment by counterclaimants to the plaintiff of \$50,000.00 that plaintiff be required to assign said interest in said partnership to one or both of the counterclaimants.

Replies to the affirmative defense and counterclaim were filed by the plaintiff and the issues made by the pleadings were heard by the chancellor, in open court.

At the conclusion of the hearing the chancellor entered a decree finding that the allegations of the answer and counterclaim were substantially true as therein stated. The decree found that a confidential and fiduciary relationship existed between Funderburg and Shappert with respect to the Martin transaction specifically finding that on October 7, 1957 Shappert brought from Adna C. Moran her one-half interest in the partnership with funds supplied by Funderburg and that subsequently and on November 30, 1957 Shappert advised Funderburg that he had decided to buy Berneita Martin's one-fourth interest in the partnership for 50,000.00 and requested a loan of that amount from Funderburg; that Funderburg told Shappert he would arrange such a loan in order to enable Shappert to buy that interest.

The chancellor further found that from December 1, 1957 to December 8, 1957 Shappert was either in Springfield, Illinois or at his home ill; that on December 8, 1957 Funderburg without disclosing or advising Shappert of his action, commenced negotiations with Mrs. Martin for the purchase of her interest in the partnership and on December 9, 1957, he acquired that interest for 50,000.00 and thereafter told Shappert he intended to retain that interest for himself.

Upon these findings the chancellor dismissed the original complaint and decreed that Funderburg held title to the one-quarter interest in the partnership which he acquired from Berneita Martin for the benefit of Shappert and directed a conveyance thereof by Funderburg to Shappert upon the payment by Shappert to Funderburg of 50,000.00 together with interest thereon at 5% from December 9, 1957 to the day of the conveyance. To reverse this decree plaintiff appeals.

It is the contention of appellant that he acquired the interest of Berneita Martin in the partnership in good faith; that he is the absolute owner thereof; that the evidence discloses that Shappert never intended to buy the interest of Berneita Martin; that the chancellor erred in impressing a constructive trust in favor of Shappert in connection with the Martin transaction and that the relief plaintiff sought in his complaint should have been granted.

The record discloses according to the statement of facts prepared by counsel for appellant, that Frank T. Moran and his wife, and C. Moran, in 1892 formed a partnership known as Frank T. Moran and Company and commenced the publication of the Delvidere Daily Republican. They had two children, Berneita and Verona. Berneita subsequently married Doctor Martin. Verona is the wife of Frederick W. Shappert Jr. and they are the defendants in this proceeding. From 1892 until 1941 Frank T. Moran was the editor and publisher of this newspaper and managed all of its business affairs. In 1941 the defendant Frederick W. Shappert, Jr. was appointed general manager of the newspaper but Frank T. Moran continued as its editor until his death in 1949.

On December 10, 1948, Frank T. Moran assigned his undivided one-half interest in the co-partnership to his daughters, Verona W. Shappert and Berneita Martin in equal shares. By agreement of the partners, the partnership continued with Edna G. Moran as the owner of an undivided one-half interest, Verona Shappert, the owner of an undivided one-quarter interest and Berneita Martin the owner of the remaining undivided one-quarter interest. The partnership continued under the management of Frederick W. Shappert, Jr., with each partner receiving a designated sum of money every month.

The plaintiff, Hugh Funderburg, and Frank T. Moran in his lifetime had been close friends for many years and Funderburg was well acquainted with Edna G. Moran and the Moran children now Bernetta Martin and Verona Shappert. A very close and friendly business and social relationship existed between Funderburg and Frederick W. Shappert Sr. and their respective wives for more than thirty years. At the time of the hearing Funderburg was 57 years of age and Shappert 55. In 1930 Shappert started the Shappert Engineering Company, as a partnership with Frank T. Moran and Hugh Funderburg, as limited partners. Moran and Funderburg made the capital available upon which the business was started.

Funderburg advised with Shappert from time to time in matters relating to the engineering business and through the years, he counseled Shappert in connection with many and various business matters and transactions. Appellant put Shappert on the Board of Directors of Boone-Belvidere Canning Company which Funderburg owned, and also placed him on the Board of Directors of the Farmers State Bank, later Farmers National Bank, of which Funderburg was President. Funderburg and Shappert were jointly interested at various times in three separate lumber yards, one in Belvidere, one in Kirkland and one in Kingston and Funderburg made available to Shappert the monies required by him in his various business ventures.

Shappert had a maximum line of credit with the Farmers National Bank and also with the Kirkland Bank in which Funderburg was also interested, to the legal limit of each bank, and if Shappert needed money beyond his line of credit in those banks, Funderburg would arrange the credit or negotiate the required loans for Shappert who had in addition to the various enterprises in which Funderburg and Shappert were jointly interested, other business interests in which Funderburg had no interest.

In the early part of August, 1957, Bernadita Martin consulted with her attorney, Charles J. Thomas in connection with her interest in the Delvidere Daily Republican. She told him that she had not been able to get any information regarding the business affairs of the partnership and asked Thomas to secure this information for her. At that time Mrs. Martin was receiving from the partnership approximately 130.00 per month.

On August 3, 1957 Thomas wrote Shappert requesting information relative to the financial condition of the partnership. On August 13, 1957, Shappert went to Thomas' office and reviewed, in considerable detail, the history of the Daily Republican. After that conference Thomas again conferred with Mrs. Martin and on August 14, 1957 he again wrote Shappert requesting that Mrs. Martin's monthly check be increased to 300.00.

Sometime after August 19, 1957, Shappert talked to Funderburg in Funderburg's home. Shappert had the letter from Thomas, dated August 19, 1957, and stated to Funderburg that he didn't feel that he could comply with the request in the letter; that he was afraid that he was going to get into a lawsuit and asked Funderburg whether or not he thought it would be advisable to buy Mrs. Moran's one-half interest; that Shappert told Funderburg that he was preparing to offer Mrs. Moran 100,000.00 for her interest but he thought that was 25,000.00 more than her interest was worth. In this conversation Shappert asked Funderburg to talk to Mrs. Moran about this and according to the testimony of Funderburg he, Funderburg, said to Shappert, "Boy Fred I will go over and talk to her providing you take Bernadita out on the same basis that you are taking Mrs. Moran out because it would be a big tragedy to leave her in with a minority interest. The woman could not protect her/self".

According to Shappert's version of this conversation it was Funderburg who suggested to Shappert that he, Shappert, buy out Mrs. Moran and that he, Funderburg volunteered to talk to Mrs. Moran, but that at no time was Berneita's interest mentioned.

Two or three days later, Funderburg and Verona M. Shappert conferred with Mrs. Moran in Mrs. Moran's home. Funderburg testified that he recommended to Mrs. Moran that she accept Shappert's offer of 100,000.00 providing he took Berneita out on the same basis. Mrs. Moran did not think it was enough money and Funderburg said he had no way of knowing whether it was too much or too little as he had never seen a financial statement and did not know the average earnings, but felt that at her age (Mrs. Moran was then 86 years old) she should sell out. According to the testimony of Mrs. Moran and Mrs. Shappert nothing was said by Funderburg in this conversation about Mrs. Martin's interest.

The record further discloses that on October 1, 1957, Edna Moran called Owen Johnson, her attorney and neighbor, for a conference at her home. Mr. Johnson went to Mrs. Moran's home and she showed him a written offer from Fred Shappert to purchase her one-half interest in the partnership for \$100,000.00. Mr. Johnson testified that Mrs. Moran told him that Funderburg had advised her to sell her interest to Shappert, and that if she did, Shappert would buy Berneita Martin's interest on the same basis and in response to her inquiry whether she should sell, he, Johnson, advised her to do so.

Thereafter and on October 7, 1957 Mrs. Moran transferred her undivided one-half interest in the partnership to Shappert for 100,000.00 plus a further payment to her of \$350.00 each month during her lifetime. After Shappert acquired this interest a meeting was held at the office of Shappert Engineering Company which was attended by Fred Shappert, Verona Shappert, Berneita Martin and Berneita's attorney, Charles S. Thomas.

At that meeting Shappert called attention to the fact that the business needed additional capital of approximately 200,000.00 for the purpose of acquiring land, building a new building, and replacing equipment and he suggested that the business be incorporated as it would be impossible for a co-partnership to borrow that kind of money. Mr. Thomas, on behalf of Mrs. Martin, offered to sell Mr. Shappert her one-quarter interest in the newspaper. Shappert replied that he was interested in buying it but not for 50,000.00. He said that her share in the paper was worth 50,000.00 but was worth 37,500.00.

On November 30, 1937 Frederick Shappert, his son, Frank Shappert and Funderburg met at the bank in Chicago. According to the testimony of the Shapperts he, Frederick Shappert, told to Funderburg that the night before he and his wife had decided to buy Bernetta's interest in the partnership for 50,000.00; that he did not have sufficient money to complete the purchase and asked Funderburg if he could loan him the necessary money for that purpose and Funderburg agreed to do so. Shappert stated that if he bought a new press for the newspaper, he would need 30,000.00 of securities belonging to the partnership and thereupon Funderburg advised him to transfer the securities belonging to the partnership, from the partnership safety deposit box to his own box and Shappert did at that time, remove the partnership securities from the partnership safety deposit box and placed them in the safety deposit box of Shappert Engineering Company.

Appellant denied that Shappert told him that he and his wife had decided to buy Bernetta's interest in the partnership for 50,000.00 or that Shappert had asked him to loan him any sum of money and his version of what occurred is that he met Shappert in the lobby of the bank, walked back to a private room on the first floor of the bank and there saw Frank Shappert sitting at a table with two boxes on the table removing

government bonds from one box and putting them into the other; that Frank M. Shappert stated that they were taking the government bonds out of the Daily Republican box and putting them in Shappert's box so that if Berneita and her lawyer attached the box they would find nothing; that appellant then said to Frederick Shappert: Fred you are making a mistake. No man can get so rich and so powerful that he can afford to take advantage of a woman .

On December 2, 1957, Mr. Thomas, attorney for Mrs. Martin, wrote a letter to Shappert stating that Berneita Martin had decided to sell her interest in the paper for \$37,500.00 and if Shappert was not interested in purchasing her interest for that amount to please inform Thomas and if Shappert knew of anyone else who would like to purchase the interest for \$37,500.00, that he, Shappert, should have that person contact Mr. Thomas.

About this time, appellant learned from the cashier of the Farmers National Bank, that Berneita Martin had withdrawn her account from the bank, and that the reason for the withdrawal was that Mrs. Martin felt bitter towards Funderburg as she felt that Funderburg had lent his influence to help Shappert and her mother, Mrs. Moran, sell her (Berneita) down the river .

On December 5 or 6th Funderburg told Berneita that he wanted her to hear his side of the story about the newspaper and told her that he had gone to Mrs. Moran and counseled her to sell her interest only on the basis that Shappert would buy Berneita's interest on the same basis. Funderburg then asked Mrs. Martin if she had sold her interest in the partnership. Mrs. Martin replied that she had offered to sell her interest to Shappert for \$37,500.00 and that her lawyer had written

a letter to Shappert making such offer. Funderburg then asked her if she was free to sell her interest to him, that if she was, he would pay her \$50,000.00 as that was the amount she was supposed to get for it. Mrs. Martin replied that she wished to talk to her lawyer, Mr. Thomas, before doing anything.

On Saturday morning, December 7th appellant called at the home of Mrs. Martin in connection with his previous offer. Mr. and Mrs. Martin were present and also Owen Johnson. At that time Mrs. Martin agreed to sell her interest to Funderburg for \$30,000.00 and Funderburg gave her his check for \$5,000.00 and told her to go to the bank and cash it so that she would be sure that the check was good, and that he would pay her the balance, as soon as the papers were drawn and signed.

Mrs. Martin did not cash the \$5,000.00 check on December 7th but on the next morning, Sunday, appellant called Mrs. Martin at her home and asked her if she would come to his home. She did so and at that time appellant told her in effect that all he wanted her to do was to either accept his offer or reject it. After some telephoning Mrs. Martin agreed to go to the bank the first thing Monday morning, cash the check for \$5,000.00 and then go to the office of Owen Johnson and execute the necessary papers which she did.

It also appears from the record and pleadings that at the time Frank T. Moran assigned one-half interest in the partnership to his two daughters that his wife, the remaining owner consented to said assignment and a new partnership agreement was entered into which set forth the respective interests of the parties but in this agreement no reference was made as to the duration of the partnership. It also appears that when Frederick W. Shappert purchased the Edna Moran one-half interest on October 7, 1957, no new partnership agreement was executed nor was a new agreement made when Hugh Funderburg purchased Bernita's interest on December 9, 1957.

Counsel for appellant points out that there are only two important or major conflicts in the evidence found in this record. The first one is in connection with the purchase by Shappert of Mrs. Moran's interest in the partnership. Appellant testified that Shappert authorized him to advise Mrs. Moran that if she would sell her interest in the partnership to Shappert for 100,000.00 that Shappert would buy Mrs. Martin's interest on the same basis. Shappert testified that he did authorize appellant to tell Mrs. Moran that he would buy her interest for 100,000.00 but denied that anything was said about Mrs. Martin's interest. Mrs. Shappert, who was present at the interview with Mrs. Moran corroborated her husband. Mrs. Moran also corroborated Shappert but her testimony in this respect was at variance with what Owen Johnson testified she told him. The other conflict in the evidence has to do with what took place in the bank on the morning of November 30, 1957. According to the testimony of Frederick . . Shappert he, Shappert, told appellant that he and his wife had decided, the night before, to buy Mrs. Martin's interest for 50,000.00 and requested appellant to loan or make available to him that amount of money for that purpose and appellant consented to do so. Appellant denied this. Shappert was corroborated by his son.

The chancellor expressly found by his decree that Shappert told appellant, on or about November 3, 1957, that conditions were such that it had become necessary for him to purchase the Martin interest. The decree also found that on November 30, 1957 Shappert informed appellant of the financial situation and needs of the partnership and stated to appellant that he had decided to purchase the interest of Mrs. Martin for \$50,000.00 and that Shappert then requested appellant to make this

sum of money available to him or to finance this purchase and that appellant not only agreed to do so but advised Chappert to go ahead and consummate this purchase.

What this record discloses is that for thirty years an exceptionally close business and social relationship existed between Funderburg, Frank T. Moran in his lifetime, Mrs. G. Moran, Mrs. Martin and Mr. and Mrs. Chappert. The business enterprises in which Chappert and Funderburg were jointly interested were extensive. Financially appellant occupied a commanding position in the community where he resided and it was with appellant that Chappert repeatedly and frequently discussed not only the financial and other phases of the partnership which is the subject matter of this litigation but other and various business enterprises. The Belvidere Republican had been for sixty-five years, prior to the time Mrs. Martin sold her interest to appellant, exclusively owned, managed and controlled by members of the Moran family. For more than thirty years Chappert had recognized the business acumen of Funderburg, depended upon him for financial aid, requested his advice and suggestions and acted upon appellant's advice and suggestions not only in connection with the Belvidere Republican but various other enterprises, and prior to the unfortunate purchase by appellant of Mrs. Martin's interest in this newspaper partnership each had the utmost confidence in the other and each entertained for the other the highest regard, esteem and respect.

It was appellant along with Frank T. Moran who made it possible for Chappert to go into the contracting business under the name of Chappert Engineering Company. It was appellant who recommended that Chappert purchase the McCartney and Fisher farms and it was appellant who made it possible for him to do so. It was appellant who interested Chappert and

made it possible for him to acquire an interest in the Belvidere Lumber and Fuel Company and in several lumber yards. It was appellant to whom Shappert turned when he desired to purchase the interest of Mrs. Loran in the partnership. It was appellant who at Shappert's request, advised Mrs. Loran to sell to Shappert and it was appellant who furnished Shappert with the money to make that purchase.

The chancellor found, and the evidence sustained the finding, that a week before appellant received the assignment of Mrs. Martin's interest appellant was informed by Shappert that he, Shappert, intended to purchase the interest which appellant acquired and that appellant agreed to loan Shappert the exact amount of money which appellant paid Mrs. Martin and which Shappert informed appellant he had determined to pay her. It was during this seven day period that Shappert was not in Belvidere or was ill at his home.

According to the testimony of Owen Johnson, appellant's attorney, Mr. Funderburg called him at his home on Saturday morning, December 7th, 1957 and told him that they were going over to Bernita Martin's home and that he was doing something I have no business doing but I don't want two women taken advantage of. Appellant then said that he was going to offer Mrs. Martin \$50,000.00 for her interest in the Belvidere Daily Republican. The record further discloses that on Sunday morning, December 9th, the bill of sale which conveyed the interest of Mrs. Martin in the partnership to appellant was executed in the office of Johnson and according to appellant's testimony he there told Mrs. Martin that if she ever changed her mind and wanted to buy her interest back she could do it; that he bought her interest in order to protect her because he felt she was left

in the 'lurch' by Shappert inasmuch as he, Funderburg, had recommended to Mrs. Moran to sell, it being his understanding that Shappert was to pay Mrs. Martin for her interest upon the same basis that Mrs. Moran's interest had been acquired by Shappert. In fact, continued appellant, it wasn't that I wanted the paper. I told her that. I said 'I want a paper to sell but not to Shappert'.

The author of the Article on Trusts in 5 Am. Jur. sec. 219, pp. 107, 108 says that a constructive or implied trust is a trust by operation of law, which arises contrary to intention against one who by fraud, actual or constructive, by any form of unconscionable conduct, concealment or questionable means or who in any way, against equity and good conscience, either has obtained or holds the legal title to property which he ought not, in equity and good conscience to be able to enjoy. Again this author says: constructive trust historically and inherently, involves an extension of the doctrine of equity to consideration to cases of fraud, actual or constructive, and at times involves only a constructive fraud that is not such as to be in substance then a refusal to perform a duty required in equity. (5 Am. Jur. Title Trusts, sec. 132, p. 1-7)

In Scatty v. Guggenheim Exploration Co. 235 U.S. 171-172, 122 N.W. 370 Judge Cardozo defined a constructive trust as the formula through which the conscience of equity finds expression. When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee.

Perhaps appellant was prompted by the most lofty and benevolent motives when he began negotiating with Mrs. Martin to acquire her interest in this partnership. He was not very considerate of his friend, however, when he stated he didn't want any interest in the newspaper and that it was for sale but not to Chappert. It is true that appellant was not the agent of Chappert during his negotiations with Mrs. Martin during the first week of December, 1957 and he recognizes that the existence of friendship and the relation of debtor and creditor cannot be itself a fiduciary relation. (Rubin v. Liebman, 311 F.2d 84, 94, 107. In view of all the facts disclosed by this record appellant should have informed Chappert of his proposed action. To remain silent, under the circumstances, until he had procured an assignment of Mrs. Martin's interest to himself was most inequitable. As Chappert's banker, business associate, intimate friend, confidant and social companion, appellant, it seems to us, should have the legal title to Mrs. Martin's interest in this partnership which he ought not, in equity and good conscience, be permitted to retain. The acquisition by appellant of the interest of Mrs. Martin in this partnership, under the facts and circumstances disclosed by this record created, under the authority, a constructive trust. This relationship so existing prior to December 7, 1957 precluded appellant from doing any act for his own gain at the expense of that relationship.

The decree appealed from is affirmed.

Reversed. Affirmed.

McNEEL, J. C. CONCUR.

SPIVER, J. C. CONCUR.

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT
FIRST DIVISION

OCTOBER TERM, 1959

CLAUDE BAILEY,

Plaintiff-Appellant,

VS.

HOWARD SCHROEDER,

Defendant-Appellee.

Appeal from the

Circuit Court of

Bureau County.

SPIVEY, J. -

Plaintiff appeals from an adverse judgment on his complaint for the return of Nine Hundred Dollars (\$900.00) paid to the defendant for two thousand (2,000) bales of hay sold by the defendant but rejected by the plaintiff as not according to the implied warranty in a sale by sample. The Circuit Court of Bureau County found the defendant not guilty as to plaintiff's complaint and entered judgment accordingly.

At a public sale on January 8, 1952 plaintiff purchased and paid for two thousand (2,000) bales of clover hay. He paid forty-five cents (\$.45) per bale and made the purchase in reliance upon sample bales exhibited by the seller. Delivery of the hay was tendered at the defendant's farm and the plaintiff accepted twenty-eight (28) bales as being in accordance to the sample and rejected the balance of the goods tendered. Plaintiff asserted and now contends that the balance of the goods tendered were not in accordance with the contract or as warranted by the sale by sample.

In a sale by sample, §16 of the Uniform Sales Act, Chapter 121-1/2, Ill. Rev. Stat. 1951, governs. Subsection (a) provides:

"There is an implied warranty that the bulk shall correspond with the sample in quality." Assuming arguendo only that the hay did not correspond with the sample, then there was a breach of warranty and plaintiff's remedy would be for that breach.

Section 69 of the Uniform Sales Act, Chapter 121-1/2, Illinois Revised Statutes, 1951 makes provision for remedies for breach of warranty. So far as it is applicable, this section provides:

(1) Where there is a breach of warranty by the seller, the buyer may, at his election

* * *

(b) Accept or keep the goods, if the property therein has not passed, and maintain an action against the seller for damages for the breach of warranty

* * *

(d) Rescind the contract to sell or the sale and refuse to receive the goods, or if the goods have already been received, return them or offer to return them to the seller and recover the price or any part thereof which has been paid

* * *

(7) In case of breach of warranty of quality, such loss, in the absence of special circumstances showing proximate damage of a greater amount, is the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they had answered to the warranty.

Plaintiff, thus, had a choice of remedies. He could rescind and recover the purchase price or accept the goods and maintain an action for the difference between the contract price and the value of the goods accepted. Plaintiff's complaint is based upon the theory of rescission and prays

for the return of the purchase price. However, plaintiff never offered to return the hay which he had accepted as being in accordance with the contract. He unqualifiedly rejected most of the hay but did accept twenty-eight (28) bales which were not tendered to the plaintiff. The trial court found that this action amounted to an acceptance of the goods and so excluded plaintiff's recovery of the purchase price.

The law of Illinois has long been settled that failure to return consideration in full defeats an attempted rescission. In *Wolf et al v. Dietzsch*, 75 Ill. 205, 210, the court said, "The doctrine repeatedly announced by this court is, that a party cannot affirm a contract in part, and rescind as to the residue. If he rescinds he must do so in toto. He must put the opposite party in as good a condition as he was in before the sale, by a return of the property purchased unless it is entirely worthless." To the same effect is *Rigdon v. Walcott*, 141 Ill. 649; 31 N.E. 158 and *Glen v. Dodson*, 347 Ill. 473; 180 N.E. 393. In the latter case the court stated, "The inability of the party to restore the consideration will not relieve him from the necessity of doing so, and it is not sufficient to offer to set off the amount against what is claimed from the other party."

The trial court concluded that when plaintiff accepted twenty-eight (28) bales of the hay delivered, he in effect accepted the goods which were the subject of the sale, and did not attempt to rescind the sale. The Court said: "After this election his remedy was not for the recovery of the purchase price, but for damages for breach of warranty * * *. The measure of damages in such a case is the difference in value between the goods as they are and the value of the goods had they answered the warranty." Plaintiff offered no evidence on this theory of damages and for this reason alone, the court determined the issues adverse to the plaintiff.

Having failed to prove any damages according to the only applicable rule for the breach of a warranty, the trial court properly found for the defendant on the complaint. *Moore Furniture Co. v. Sloane*, 166 Ill. 457; 46 N.E. 1128; *Wheelock v. Berkeley*, 138 Ill. 153; 27 N.E. 942; *Olney*

Seed Co., Inc. v. Johnson Farm Equipment Co., 342 Ill. 2 pp. 547;
97 N.E. 2d 480.

Judgment affirmed.

McHeag P.J. and Love J. Concur

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